TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 352.

JAMES L. UTTER AND ELIZABETH B. VOORHEES, APPELLANTS,

vs.

B. J. FRANKLIN, GOVERNOR; C. P. LEITCH, AUDITOR; AND C. M. BRUCE, SECRETARY, LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED APRIL 8, 1895.

(16,556.)

(16,556.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 777.

JAMES L. UTTER AND ELIZABETH B. VOORHIES, APPELLANTS,

vs.

B. J. FRANKLIN, GOVERNOR; C. P. LEITCH, AUDITOR AND C. M. BRUCE, SECRETARY, LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 9, 1897.

1 Supreme Court.

TERRITORY OF ARIZONA, *ss*:

I, J. L. B. Alexander, clerk of the supreme court of the Territory of Arizona, do hereby certify the annexed instrument to contain a full, true, and correct copy of the petition for a writ of mandamus in the matter of the application of James L. Utter and Elizabeth B. Voorhies for a writ of mandamus against Benjamin J. Franklin, C. P. Lietch, and C. M. Bruse, loan commissioners of the Territory of Arizona, filed in the supreme court of Arizona Territory, and of the respondents' answer to said petition and of the demurrer to said answer and of all the proceedings had in said court in said cause, and that the citation hereunto annexed is the original citation issued in said cause and lodged in my office: and I further certify that no opinion has been filed by said court in said cause in my office at this date.

Seal Supreme Court of Arizona.

In testimony whereof I have hereunto set my hand and affixed the official seal of said supreme court of Arizona, at Phœnix, the capital of Arizona, this 30th day of March, A. D. 1897.

J. L. B. ALEXANDER, *Clerk.*

2 In the Supreme Court in and for the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of the Territory of Arizona, Defendants.

The plaintiffs petition the court and allege—

That plaintiff James L. Utter resides at Oak Hill, in the State of New York, and Elizabeth B. Voorh*h*ies resides in the city of New York, in said State, and that defendants reside in the city of Phœnix, Arizona Territory, and that they constitute and compose the loan commissioners of the Territory of Arizona, and are acting as such.

II.

The plaintiffs allege that by virtue of the authority of the act of the Legislative Assembly of the Territory of Arizona entitled "An act to promote the construction of a certain railroad," approved February 21st, 1883, the county of Pima, in said Territory, did, on the first day of July, A. D. 1883, issue its bonds, each for the
3 sum of one thousand dollars, to the number of one hundred and fifty, and which said bonds are numbered consecutively 1 to 150, inclusive, and all of said bonds are in the same words and figures, of which the following is a copy, to wit:

1—777

"UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.*

"One thousand dollars. One thousand dollars.

"The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January, and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

"This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled 'An act to promote the construction of a certain railroad' approved by the governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

"In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the said Pima county, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed hereto the seal of said county recorder's office this first day of July, A. D. 1883.

"JAMES H. TOOLE,
"*Chairman Board Supervisors.*
"CHAS. R. DRAKE,
"*County Recorder.* [SEAL.]

"WILLIAM J. OSBORN,
"*Clerk Board of Supervisors.* [SEAL.]"

And to each of said bonds were attached forty coupons numbered consecutively 1 to 40, inclusive, each for the sum of
4 thirty-five dollars, and the first one became due January 1st, 1884, and the next one six months thereafter, and so on; one became due on the first day of January and one the first day of July in each successive year, the last one on the first day of July, A. D. 1903; and delivered the same, with the coupons attached, to the Arizona Narrow Gauge Railroad Company, as is provided for in said act, in exchange for a like number and denomination of bonds of that company, with like coupons thereto attached.

And plaintiffs allege that the said railroad company, then the owner of said bonds, sold the same in open market for a good and valuable consideration, and after divers sales and deliveries the plaintiffs, for good and valuable consideration then and there paid, purchased the said bonds and all the coupons thereof, except the

first seven, in open market, and the same were delivered to the plaintiffs, who are now the owners of the same.

Plaintiffs allege that none of said bonds or the coupons attached thereto (except the first seven) have been paid, and the amount of the principal of each bond and matured coupons thereof owned by plaintiffs July 1st, 1896, was $1,665.00, and on January 1st, 1897, the sum of $1,700.00, so that the total of principal and matured coupons July 1st, 1896, was $249,750.00, and on January 1st, 1897, is $255,000.00.

5 Plaintiffs allege that each of said coupons bear interest at the rate of seven per cent. per annum from the date of maturity, aggregating an amount up to July 1st, 1896, of $34,964.50, and all aggregating—that is to say, principal, coupons, and interest on coupons on January 1st, 1897—the sum of $289,964.50.

Plaintiffs allege that by law it is the duty of defendants to provide for the redeeming and refunding of the said county indebtedness, and to issue bonds for said indebtedness in redemption of the said bonds, coupons, and interest as aforesaid; and on the 12th day of December, A. D. 1896, the plaintiffs made demand on defendants that the defendants, as loan commissioners of the Territory of Arizona, issue bonds as provided by law in exchange for said bonds, coupons, and interest as aforesaid.

Which said demand was made in writing by serving on the defendants and causing to be filed with the clerk of said commission a paper in writing, a copy of which is herewith filed and made a part hereof and marked "Exhibit A."

And the plaintiffs allege that the defendants have failed and refused hitherto to comply with said request and demand and hitherto and now refuse so to do; that plaintiff- have not a plain, speedy, and adequate remedy in the ordinary course of law.

Plaintiffs therefore pray that there issue out of this court an alternative writ of mandamus, directing and requiring the defendants, acting as the loan commissioners of the Territory of

6 Arizona, to issue bonds in exchange for said indebtedness or show cause before said court why the peremptory writ of mandamus shall not issue commanding them to perform their said duty, and they pray for such other and further relief as the law may give them.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

TERRITORY OF ARIZONA, }
County of Pima, } ss:

W. H. Barnes, being first duly sworn, on oath states that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true in substance and in fact. He also states that he is the authorized agent of the plaintiffs in this behalf and makes this affidavit for them.

W. H. BARNES.

Subscribed and sworn to before me this 24th day of December, A. D. 1896.

[SEAL.] JOHN H. MARTIN,
Notary Public, Pima County, A. T.

(Endorsement:) No. 546. In the supreme court, Territory of Arizona. James L. Utter and Elizabeth B. Voorhies, plaintiff-, *vs.* Benjamine J. Franklin, C. P. Leitch, & C. M. Bruce, loan commissioners of the Ter. of Arizona, def't-. Petition. Filed Dec. 31, 1896. J. L. B. Alexander, clerk.

7 Whereas, by virtue of the authority of the act of the Legislative Assembly of the Territory of Arizona entitled "An act to promote the construction of a certain railroad," approved February 21st, 1883, the county of Pima, in said Territory, did, on the first day of July, A. D. 1883, issue its bonds, each for the sum of one thousand dollars, to the number of one hundred and fifty, numbered consecutively 1 to 150, inclusive, and all of said bonds are in the same words and figures, of which the following is a copy, viz:

UNITED STATES OF AMERICA, *Territory of Arizona, County of Pima.*

One thousand dollars. One thousand dollars.

The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the treasurer of said county, in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States, with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima county, semi-annually, on the first day of January, and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the board of supervisors of said county of Pima, under and by virtue of an act of the legislature of Arizona entitled "An act to promote the construction of a certain railroad" passed by the Legislative Assembly of the Territory of Arizona, and approved by the governor thereof the 21st day of February, A. D. 1883, and this bond is one of a series of two hundred issued in pursuance of said act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the bonds of which this is one.

In testimony whereof, the said county by its board of supervisors has caused this bond and the coupons hereto attached, to be signed by the chairman of the board of supervisors, and countersigned by the clerk of said board, and by the county recorder of the
8 said county of Pima, and the said clerk has affixed hereto the seal of said county, and the said recorder has affixed

hereto the seal of said county recorder's office this first day of July, A. D. 1893.

JAMES H. TOOLE,
Chairman Board Supervisors.
CHAS. R. DRAKE,
County Recorder. [SEAL.]

WILLIAM J. OSBORN,
Clerk of Board of Supervisors. [SEAL.]

And to each of said bonds were attached forty coupons, numbered consecutively from 1 to 40, each for the sum of thirty-five dollars, and the first one became due January 1st, 1884, and the next one six months thereafter, and so on; one became due on the first day of January and one the first day of July in each successive year; the last one on the first day of July, A. D. 1903;

And delivered the same, with the coupons attached, to the Arizona Narrow Gauge Railroad Company, as is provided for in said act;

And whereas the said bonds and the interest coupons are now in the possession of and the property of James L. Utter, who resides in Oak Hill, New York, and Elizabeth B. Voorhies, who resides in New York city, and who purchased the same in open market for good and valuable consideration by them paid to the then holders thereof;

And whereas none of the said coupons attached to said bonds have been paid; the whole of said bonds and all of the coupons attached, from coupons No. 8 to No. 27, inclusive, is the
9 amount of principal and interest accrued up to January 1st, 1897, unpaid, viz., the sum of $1,700.00 on each of said one hundred and fifty bonds, making a total of $255,00-.00 of principal and interest, as aforesaid, of the said bonds and said coupons, other evidences of indebtedness which were heretofore as aforesaid issued under the said authority of the legislature of Arizona; all of which said bonds and coupons are here and now offered for inspection by the loan commissioners;

And whereas, by act of Congress entitled "An act amending and extending the provisions of an act of Congress entitled 'An act approving, with amendments, the funding act of Arizona, approved June twenty-fifth, eighteen hundred and ninety,' and the act amendatory thereof and supplemental thereto, approved August third, eighteen hundred and ninety-four," approved June 6th, 1896, as follows:

Be it enacted, etc., That the provisions of the acts of Congress, approved June 25th, 1890 and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of the Territory, and the counties, municipalities, and school districts thereof, as provided in the act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enact-

ments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance
10 with the terms of the acts of the legislature by which they were authorized, shall be funded into the lower-interest-bearing bonds, as provided by this act.

SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress, approved June 25th, 1890, and the act amendatory thereof and supplemental thereto, approved August 3rd, 1894 are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act provided, until January 1st, 1897; provided, that nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed and made valid and authorized to be funded. Approved June 6, 1896.

And whereas, on the 12th day of December, A. D. 1896, the undersigned made a demand in writing on the board of supervisors of the said county of Pima that they report to the loan commissioners of the Territory of Arizona the said outstanding bonds and indebtedness for the purpose of —, and that said loan commissioners may, as by law they are required to do, provide for the redeeming or refunding of the county indebtedness aforesaid;

And whereas the said board of supervisors of said county have hitherto failed to comply with said demand, and have failed hitherto to make said report, and have hitherto failed to make such demand on the loan commissioners of said Territory:

Now, therefore, we, the undersigned, owners of said bonds
11 and coupons, having purchased the same for good and valuable consideration, hereby and now in writing demand that you, the said loan commissioners of the Territory of Arizona, require an official report from the board of supervisors of said county of Pima of their bonded and outstanding indebtedness, including the indebtedness aforesaid, as evidenced by said bonds and coupons.

And we also demand that said loan commissioners shall provide for the redeeming or refunding of the said county indebtedness, notwithstanding the said board of supervisors have failed to do their duty as aforesaid, and shall issue bonds for said indebtedness in redemption of the same as required by law.

And we, here and now having said bonds and coupons in hand for inspection and delivery, show the same to said loan commissioners and offer to deliver the same in exchange for bonds of the Territory as provided by law, viz., section seven of the act of March 19th,

1891, of Arizona, of the Laws of 1891, page 123, as provided for by the act of Congress approved June 25th, 1890, aforesaid.

Dated Phœnix, Arizona, December 14th, A. D. 1896.

JAMES L. UTTER,
ELISABETH B. VOORHIES,
Loan Commissioners of the Territory of Arizona.
W. H. BARNES,
JOHN H. MARTIN,
Attorneys for Petitioners.

To B. J. Franklin, governor; C. P. Leitch, auditor; C. M. Bruce, secretary of the Territory.

12 (Endorsement:) No. 546. In the supreme court, Territory of Arizona. James L. Utter and Elizabeth B. Voorhies, plaintiff-, *vs.* Benjamine J. Franklin, C. P. Leitch, and C. M. Bruce, loan commissioners of the Territory of Arizona, defendants. Plaintiffs' "Exhibit A." A duplicate of the within filed in the office of the secretary of the loan commission of Arizona this 14th day of December, 1896. Alfred Franklin, secretary of loan commission. Filed December 31st, 1896. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH VOORHEIS, Plaintiffs, *vs.* BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUSE, Loan Commissioners of Arizona, Defendants.	Answer and Response to Writ.

The defendants named in the above-named cause came, and, for answer to the complaint and peti-on for mandamus herein, say:

First.

13 They except to the sufficiency of the said petition herein and demur thereto for the following reasons, to wit:

1. Because the said complaint and petition fails to state facts sufficient to constitute a cause of action, and therefore mandamus in this action will not lie.

2. Because said petition seeks to compel the funding of bonds that were issued contrary to law and in violation of the grant of powers given territorial legislatures by the laws of the Congress of the United States.

3. Because the said petition seeks to compel the funding of bonds heretofore declared void by this court and by the Supreme Court of the United States, all of which this court judicially knows.

Wherefore defendants pray judgment.

Second.

For *for* a further and second defense herein defendants aver and give the court to know that the said bonds herein declared on in this

action and for the funding of which this suit is brought to compel are the same identical bonds that were involved in the suit in which —— Lewis was plaintiff and The County of Pima, in the Territory of Arizona, was defendant, in which suit was brought on 2,250 coupons of said bonds in the district court of the said county
14 of Pima and which were attached to these same bonds, and in which suit these same bonds were placed in issue, and the payment of which, together with the said coupons, was resisted on the ground that the said bonds were issued contrary to and in violation of law, and that the same were therefore void, and that the same and each and all of the said bonds were in said action, each and every one of the same, together with the said coupons thereto attached, by the judgment of the said court, after due deliberation, in open court adjudged to be void and of no binding force and obligation on the said county of Pima, and that the said action was by appeal carried from said court to the supreme court of the Territory of Arizona, and was there on the 14th of April, 1893, by said supreme court affirmed, and the said bonds and the said coupons thereto attached were again and by that court declared void and of no binding effect on the said county of Pima.

That an appeal was taken from the said decision of the said supreme court of the Territory of Arizona to the Supreme Court of the United States, and in that court, at the October term of the same, 1894, these same identical bonds were declared void and of no binding force and effect against the said county of Pima. Therefore defendants say and plead *res adjudicata*, and that therefore this action cannot be maintained.

15 Wherefore defendants pray the court that plaintiffs take nothing by this action; that their petition be dismissed, and that defendants go hence without day and have all of their costs in and about this action expended, and for all general relief.

B. J. FRANKLIN,
C. P. LEITCH, AND
C. M. BRUCE,
Loan Commissioners and Defendants,
By the ATTORNEY GENERAL.

(Endorsement:) James L. Utter and Elizabeth Voorhies *vs.* B. J. Franklin *et al.*, loan commissioners. Answer & response. Filed January 19, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH VOORHIES, Plaintiffs,
vs.
BENJAMIN J. FRANKLIN, C. P. LEITCH, and C. M. BRUCE, Loan Commissioners of Arizona, Defendants.

And now comes the said plaintiffs, by Barnes & Martin, their attorneys, and to the said second defense of the said defend-
16 ants in cause heretofore filed *and* demur and say that the same does not state facts sufficient to constitute any defense

to said cause, nor does the same show any cause or reason why the writ of mandamus prayed for in this cause should not issue; and they therefore pray that the said writ do issue as prayed for, notwithstanding the said defense set up in said second answer.

By BARNES & MARTIN,
Attorneys for Plaintiffs.

(Endorsements:) No. 546. In the supreme court of the Territory of Arizona. James L. Utter and Elizabeth Voorhies, plaintiffs, *vs.* Benjamin J. Franklin, C. P. Leitch, and C. M. Bruce, loan commissioners of Arizona, defendants. Demurrer to answer. Filed January 19, 1897. J. L. B. Alexander, clerk. Barnes & Martin, attorneys for plaintiffs.

17 In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Plaintiffs & Petitioners, *vs.* BENJAMINE J. FRANKLIN, C. P. LIETCH, and C. M. Bruce, Loan Commissioners of the Territory of Arizona, Defendants.	Petition for a Writ of Mandamus.

Be it remembered that on the 13th day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, viz:

It is ordered that the hearing of this cause be set for January 21, 1897.

Be it further remembered that on the 21st day of January, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in said above-entitled cause, viz:

In this cause it is ordered that hearing thereof be reset for tomorrow morning, January 22, 1897.

18 Be it further remembered that on the 22nd day of January, 1897, that same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, viz:

This cause came on to be heard this day and was argued by Mr. W. H. Barnes, for petitioners, and argument ordered continued till after recess this afternoon.

The court having reconvened after recess, at 2 o'clock p. m., the following further proceedings were had in said court in said cause, viz:

The argument in this cause was resumed by Mr. Barnes, for petitioners, and by Mr. C. W. Wright, for defendants, who, on motion of the attorney general, was entered as associate counsel for defendants herein and argument was continued until next Thursday, January 28th, 1897.

Be it further remembered that on the 29th day of January, 1897,

the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, viz:

This cause came on to be argued on this day. Mr. Barnes resumed his argument for petitioners and cause was ordered submitted.

19 Be it further remembered that on the 23rd day of February, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, viz: This cause having been heretofore argued by respective counsel for petitioner- and defendants and submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises, it is ordered that the petition for a writ of mandamus herein filed be, and the same is hereby, denied; and it is further ordered and adjudged that defendants recover against the petitioner- herein their costs in this court incurred in this cause, taxed at $12.50; and be it further remembered that on the 25th day of February, 1897, the same being one of the judicial days of the January term, 1897, of the supreme court of Arizona, the following proceedings were had in said court in the above-entitled cause, viz: In this cause Mr. W. H. Barnes, attorney for petitioners herein, in open court gave notice of appeal in this cause to the Supreme Court of the United States, and prayed for an allowance of such an appeal; whereupon it was ordered by the court that an appeal be granted petitioners herein to the Supreme Court of the United States from the order and judgment of this court upon

20 said petitioners filing with the clerk of this court a bond in the sum of one thousand dollars, approved according to law.

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER *et al.*, Petitioners,
vs.
THE LOAN COMMISSIONERS OF ARIZONA, Defendants. } Motion.

Now come the petitioners, by William H. Barnes, their attorney, and here and now in open court gives notice of appeal in said cause to the Supreme Court of the United States, and asks that the said notice be entered upon the minutes of this court.

Petitioners also pray that this court will grant an appeal from this court to the Supreme Court of the United States upon giving, executing, and filing with the clerk a bond, to be approved according to law, in the penal sum of one thousand dollars.

By W. H. BARNES,
Attorney for Petitioners.

21 (Endorsement:) In supreme court of Territory of Arizona. James L. Utter *et al.*, petitioners, *vs.* B. J. Franklin and The Loan Commissioners of Arizona, respondents. Petition for allowance of appeal to U. S. Supreme Court. Filed Feb'y 25, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER *et al.*, Petitioners,
vs.
THE LOAN COMMISSIONERS OF ARIZONA, Respondents. } Affidavit.

William H. Barnes, being duly sworn, says that he is the attorney and agent for the petitioners in the above-entitled cause. He states that he knows the issues raised in said cause and the amount involved in this suit.

He states that the amount involved in this suit is one hundred and fifty thousand dollars and bonds, issued as alleged in the petition, now held by the petitioners, together with the interest on the same, as 7 % per annum, being a total of something over one hundred and eighty thousand dollars.

22 W. H. BARNES.

Subscribed and sworn to before me this 25th day of February, A. D. 1897.

CHAS. H. HOLMES,
[SEAL.] *Notary Public.*

(Endorsements:) In the supreme court of Territory of Arizona. James L. Utter *et al.*, petitioners, *vs.* B. J. Franklin and The Loan Commissioners of Arizona. Affidavit of value. Filed Feb'y 25, 1897. J. L. B. Alexander, clerk.

In the Supreme Court of the Territory of Arizona.

JAMES L. UTTER *et al.*, Petitioners,
vs.
THE LOAN COMMISSIONERS OF ARIZONA, Respondents.

Now come the petitioners in this cause, by William H. Barnes, their attorney, and alleges that there is a manifest error in
23 the records of the proceedings in said cause in said court, in this, to wit:

First. That the court erred in holding that the petition did not state facts sufficient to sustain the remedy asked for.

Second. That the court erred in denying the mandamus asked for.

Third. That the court erred in sustaining the demurrer to the petition in said cause.

Fourth. That the court erred in refusing to sustain the demurrer to the special defense set up in bar in the answer of respondents.

The petitioners therefore pray that the said cause be reversed, and that such judgment be rendered as the facts alleged and the remedy asked for requires.

By W. H. BARNES,
Attorney for Petitioners.

(Endorsement:) No. 546. In the supreme court, Territory of Arizona. James L. Utter *et al.*, petitioner-, *vs.* B. J. Franklin *et al.*, etc., defendants. Assignment of errors. Filed Feb'y 25, 1897. J. L. B. Alexander, clerk.

24 In the Supreme Court in and for the Territory of Arizona.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Petitioners and Appellants,
vs.
THE LOAN COMMISSIONERS IN AND FOR THE SAID TERRITORY, Respondents and Appellees.

Known all men by these presents that we, James L. Utter and Elizabeth B. Voorhies, as principals, and John A. Black and Rollin R. Richardson, residents of the Territory of Arizona, as sureties, are held and firmly bound unto the respondents and appellees in the penal sum of one thoudans dollars, lawful money of the United States, to be paid to the said respondents and appellees, and for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this 15th day of March, A. D. 1897.

Whereas the above-named James L. Utter and Elizabeth B. Voorhies have taken an appeal to the Supreme Court of the United States, and the same having been allowed, from a final judg-
25 ment rendered against them and in favor of the respondents and appellees in the supreme court of the Territory of Arizona to reverse the judgment rendered in said court:

Now, therefore, the condition of this obligation is such that if the above-named James L. Utter and Elizabeth B. Voorhies shall prosecute their said appeal with effect and, if they fail to make their plea good, shall answer all costs, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES L. UTTER, [SEAL.]
By WM. H. BARNES, *His Attorney.*
ELIZABETH B. VOORHIES, [SEAL.]
By WM. H. BARNES, *Her Attorney.*
JOHN A. BLACK. [SEAL.]
ROLLIN R. RICHARDSON. [SEAL.]

UNITED STATES OF AMERICA, } ss:
Territory of Arizona, County of Pima, }

Rollin R. Richardson and John A. Black, being severally duly sworn, depose and say each for himself that he is a resident and freeholder within the Territory of Arizona; that he is at least worth the sum of one thousand dollars over and above his just debts and liabilities and exclusive of property exempt from execution.

26 JOHN A. BLACK.
ROLLIN R. RICHARDSON.

Subscribed and sworn to before me this 15th day of March, A. D. 1897.

[SEAL.] JOHN H. MARTIN,
Notary Public, Pima County, Ariz.

The within bond is hereby approved this 16th day of March, A. D. 1897.

A. C. BAKER,
Chief Justice.

(Endorsement:) No. 546. In the supreme court. Utter *et al. vs. Voorhies.* Appeal bond. Filed March 16, 1897. J. L. B. Alexander, clerk.

In the Supreme Court in and for the Territory of Arizona.

JAMES L. UTTER *et als.*, Plaintiff-,
vs.
LOAN COMMISSIONERS OF ARIZONA, Respondents.

27 The above-named plaintiffs, conceiving themselves aggrieved by the final judgment entered on the 23rd day of February, A. D. 1897, in the above-entitled action and court against them and in favor of respondents, do*es* hereby appeal therefrom to the Supreme Court of the United States; and they having prayed an appeal in this cause in said court in open court that the said appeal be allowed, and the said court having allowed said appeal upon condition that plaintiffs execute a bond, conditioned according to law, in the sum of one thousand dollars, to be approved according to law, and the said plaintiffs having caused a bond to be filed, conditioned according to law and approved according to law, and a citation having been duly signed and issued, and the service of the same having been waived by the attorney general of the Territory for and on behalf of the respondents, and their appearance in said cause having been endorsed on the back of said citation, plaintiffs pray that a transcript of the record, proceedings, opinion, and judgment, duly authenticated, may be sent to the Supreme Court of the United States.

W. H. BARNES,
Attorney for Plaintiffs.

(Endorsement:) No. 546. In the supreme court. James L. Utter *et al.*, plaintiffs, *vs.* Loan Commissioners of Arizona, respondents. Application for appeal. Filed March 23, 1897. J. L. B. Alexander, clerk.

28 In the Supreme Court of the United States.

JAMES L. UTTER and ELIZABETH B. VOORHIES, Petitioners and Appellees,
vs.
B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona, Respondents and Appellees.

The United States of America to B. J. Franklin, governor; C. P. Leitch, auditor, and C. M. Bruce, secretary, loan commissioners of the Territory of Arizona, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, D. C., on the second Monday in October, A. D. 1897, pursuant to an appeal allowed by the honorable chief justice of the supreme court of Arizona on the — day of ——, A. D. 1897, from a judgment rendered in the supreme court of the Territory of Arizona on the — day of ——, A. D. 1897, in an action pending in that court wherein you were the defendants and respondents and the said James L. Utter and Elizabeth B. Voorhies were plaintiffs and petitioners, to show cause why that said judgment in your favor should not be set aside, reversed, corrected, and speedy justice should not be done to the parties in whose behalf said appeal is allowed.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of March, A. D. 1897.

A. C. BAKER,
Chief Justice of the Supreme Court of the Territory of Arizona.

29 I, J. F. Wilson, attorney general of the Territory of Arizona, hereby acknowledge service of the above citation for and in behalf of B. J. Franklin, governor; C. P. Leitch, auditor, and C. M. Bruce, secretary, and loan commissioners of the Territory of Arizona, a copy of the same having been served on me this 16th day of March, A. D. 1897.

J. F. WILSON,
Attorney General, Territory of Arizona.

30 [Endorsed:] No. 546. In the supreme court, Territory of Arizona. James L. Utter and Elizabeth B. Voorhies *vs.* Loan Commissioners of the Territory of Arizona. Citation. Lodged in my office this 16th day of March, A. D. 1897. J. L. B. Alexander, clerk supreme court of Arizona Territory.

Endorsed on cover: Case No. 16,556. Arizona Territory supreme court. Term No., 777. James L. Utter and Elizabeth B. Voorhies, appellants, *vs.* B. J. Franklin, governor; C. P. Leitch, auditor, and C. M. Bruce, secretary, loan commissioners of the Territory of Arizona. Filed April 8th, 1897.

No. 94.
Brf. of Dillon, Hubbard & Dillon
FILED
DEC 3 1898
JAMES H. McKENNEY,
Clerk

Barnes for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Dec. 3, 1898.

No. 94.

James L. Utter and Elizabeth B. Voorhies,
Appellants,

against

B. J. Franklin, Governor; C. P. Leitch, Auditor; and C. M. Bruce, Secretary, Loan Commissioners of the Territory of Arizona.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
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Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 94.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

AGAINST

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor; and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANTS.

Statement of the Case.

This is an appeal from a judgment of the Supreme Court of the Territory of Arizona, denying the petition of the appellants for a writ of mandamus (Record, p. 10). The proceedings in this case were begun in the Supreme Court of the Territory of Arizona by the

plaintiffs filing in said court, December 31, 1896, their petition for said writ in the manner provided by the Code of Arizona (Record, pp. 1–7).

THIS PETITION, and Exhibit A thereto attached and made a part thereof, set forth the facts as to the issue of certain bonds by the County of Pima, and that the plaintiffs are now the owners of the said bonds, having purchased them for value in the open market. The plaintiffs state in their petition that by law it is the duty of the defendants the Loan Commissioners of the Territory of Arizona under the Acts of Congress in that behalf and the Territorial Act of March 19, 1891, to issue to the plaintiffs on demand the funding bonds of the Territory of Arizona in exchange for the said Pima County bonds. Exhibit A, attached to the said petition (Record, pp. 4–7), is a copy of the written demand which the plaintiffs made upon the said Loan Commissioners, December 14, 1896. The petition for writ of mandamus states that at the time of the filing of said petition—December 31, 1896—the defendants, said Loan Commissioners, had failed and refused to comply with the said written demand; that the plaintiffs have no other remedy to obtain the issue of the said refunding bonds, and therefore they ask the Supreme Court of the Territory of Arizona for a writ of mandamus, addressed to the said Loan Commissioners, commanding them to issue the bonds of the Territory of Arizona in exchange for the said Pima County bonds held by petitioners.

The defendants filed an answer to the said petition for a writ of mandamus (Record, p. 7), in which answer they in substance except to the sufficiency of the said petition, and demur thereto on the alleged ground

that the said petition fails to state facts sufficient to constitute a cause of action, and set up as a defense that the said Pima County bonds had been adjudged to be invalid, and that this judgment had been affirmed on appeal by the Supreme Court of the United States (Decision reported, *Lewis vs. Pima County*, 155 U. S., 54).

The plaintiffs demurred to the said answer (Record, pp. 8, 9).

It thus appears that the questions presented on the record are questions of law. The cause was submitted on the two demurrers (Record, pp. 9, 10). The Supreme Court of the Territory gave judgment, denying the writ of mandamus (Record, pp. 9, 10).

The court did not state nor does the record show whether the Court gave judgment on the demurrer to the petition for the writ of mandamus, which statement, if it had been made, might have implied that, notwithstanding the facts stated in the petition, and notwithstanding the validity of the Pima County bonds, there was no right to have them refunded. Neither did the court state that it gave judgment on the demurrer to the answer or return to the writ, which statement, if it had been made, might have implied that the court refused the mandamus because it believed the Pima County bonds themselves invalid. The only judgment was simply one denying the petition for mandamus (Record, p. 10). The court did not render any opinion, and it is impossible to state on which of these two grounds it rendered its decision.

An appeal to this Court was thereupon taken by the plaintiffs, and allowed by the Supreme Court of Arizona (Record, p. 10), and the appeal was perfected in regular course (Record, pp. 10–14).

Assignment of Errors.

(Record, p. 11.)

First. That the Court erred in holding that the petition did not state facts sufficient to sustain the remedy asked for.

Second. That the Court erred in denying the mandamus asked for.

Third. That the Court erred in sustaining the demurrer to the petition in said cause.

Fourth. That the Court erred in refusing to sustain the demurrer to the special defense set up in bar in the answer of respondents.

Argument.

An order granting or refusing a writ of mandamus is a "final judgment" appealable to this Court.

Davies vs. Corbin, 112 U. S., 36.

Riggs vs. Johnson County, 6 Wall., 166.

In order to understand this case it is necessary to to examine in chronological order the various Acts of Congress and of the legislature of the Territory of Arizona relating to the matter in controversy and the history of those acts, and then examine the facts as to these Pima County bonds and ascertain the exact relation between the said legislation and legislative history and the said bonds.

We admit, and our argument assumes that this Court in the case of *Lewis vs. Pima County*, 155 U. S., 54, A. D. 1894, held invalid certain matured coupons from the very bonds which are now owned by the plaintiffs and which form the subject matter of this suit. That decision will no doubt be urged here by the defendants, as it was urged by them in the Supreme Court of Arizona as the answer to the petition for mandamus. To this argument we reply that these Pima County bonds had been validated by act of the Congress of the United States since the decision of this Court in the case of *Lewis vs. Pima County* and before the institution of these mandamus proceedings. The defendants also urged in the court below as a matter of law that, even if the bonds had been validated, the duty of the Loan Commissioners to fund them was not mandatory. To this latter argument we of course reply that the act of Congress of June 6, 1896, and the Act of the Territory of Arizona

of March 19, 1891, make this duty of the Loan Commissioners mandatory, and give the plaintiffs as the holders of these bonds the right to exchange them for funding bonds of the Territory. This in general is a brief outline of the questions which are presented to this court.

With this preface we proceed now to state the acts of Congress and of the Territory which relate to the matter under consideration and their legislative history and the relation of the same to these Pima County bonds.

The bonds in question in this case of date July 1, 1883, were issued under an act of the legislature of the Territory of Arizona, entitled, "An act to promote the construction of a certain railroad," approved by the Governor February 21, 1883 (Record, p. 4). The said act is printed at length in the Appendix to this brief (*Post*, p. 61). This court in the case of *Lewis vs. Pima County*, 155 U. S., 54, A. D. 1894, held certain coupons from the bonds in question invalid on the ground that the said act of the legislature of the Territory of Arizona of February 21, 1883, was invalid as being contrary to an act of Congress, entitled, "An act explanatory of section 1889 of the Revised Statutes of the United States, and to ratify and confirm certain territorial legislation, and for other purposes," approved June 8, 1878. The said act of June 8, 1878 (20 Stats., 101), is printed in full in the Appendix to this brief (*Post*, p. 60).

While we do not need, in order to establish our present case, to question the correctness of the decision of this court in said case of *Lewis vs. Pima*

County, yet we deem it proper respectfully to refer to that decision as a part of the history of the case now under consideration to aid in arriving at a correct understanding of the whole matter and of the case presented on the present record. We make this reference with less hesitation owing to the fact that the ground upon which the *Lewis Case* was decided in this court seems *not to have been referred to or discussed in the briefs and arguments of counsel* in this court, and because a careful examination of the legislation of Congress and of the history of such legislation has convinced us that, if the legislation and facts bearing on the point on which the case was decided had been fully presented and argued by the counsel in that case in this court, or had otherwise come to the attention of this court, a different conclusion must have been reached.

Act of Congress of June 8, 1878, considered and shown not to prohibit territorial legislatures from authorizing railroad aid bonds by Counties.

We proceed to examine the said act of June 8, 1878 (20 Stat., 101), reprinted in full in the Appendix to this brief *(post*, p. 60*)*. The clause in this act on which, and on which alone, this court decided the case of *Lewis vs. Pima County*, 155 U. S., 54, was as follows:

"But nothing herein shall have the effect to create any private right except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs."

Note that this language contains no prohibition upon the legislatures of the Territories. It simply provides that " nothing **herein** [that is, in this act of Congress of June 8, 1878] shall have the effect * * * to **authorize** any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs." Clearly, this is not a prohibition upon the legislatures of any of the Territories. This clause in the act of Congress of June 8, 1878, left the matters therein mentioned to be dealt with by the territorial legislatures themselves, subject, of course, to any supervisory control of such legislation by any future act of Congress; but there is nothing in this act in and of itself to take away or in any manner restrain the power of the legislatures of the Territories to enact any legislation as to any county, city or town incurring any debt or obligation.

Under the organic act of the Territory of Arizona (12 Stat., 664), which, by reference, makes part thereof the organic act of the Territory of New Mexico (9 Stat., 446), and under the Revised Statutes of the United States (Sec. 1851), the legislative power of the Territory of Arizona extends " to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." The provisions of the organic act of the Territory of Arizona and of the Revised Statutes of United States are as follows :

The Organic Act of the Territory of Arizona of February 24, 1863 (12 Stat., 664), provides :

" SEC. 2. That the government hereby authorized shall consist of an executive, legislative and judicial power. * * * The legislative power shall consist of a council of nine members and a house of representatives of eighteen. * * * The powers, duties

and the compensation of the governor, legislative assembly * * * shall be such as are conferred upon the same officers by the act organizing the territorial government of New Mexico."

The Organic Act of New Mexico (9 Stat., 446) provides:

SECTION 5. "That the legislative power and authority of said territory shall be vested in the governor and a legislative assembly."

SECTION 7. "That the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act."

The Revised Statutes of the United States provide as follows:

SECTION 1846. "The legislative power in each Territory shall be vested in the governor and a legislative assembly."

SECTION 1851. "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States."

At the time of the passage of the act of February 21, 1883, by the Legislature of the Territory of Arizona authorizing the issue of the bonds of Pima County, there was no restriction upon the general legislative power of the Territory of Arizona, or of other Territories, against their authorizing the issuing of railroad aid bonds. The said act of February 21, 1883, was never disapproved by Congress; nor were the other and numerous similar Territorial Acts authorizing railroad aid bonds. Such restraint upon the issue of railroad aid bonds did not, as we shall see, come until a later date, and in a later act of Congress, namely, in the actof July 30th, 1886 (24 Stat. 170), commonly called the "Harrison

act," where this matter was dealt with and a prohibition placed upon the legislatures of the Territories. *Note also that this very act of June 8, 1878, itself expressly recognizes the general legislative power of the legislative assemblies of the Territories as continuing to exist in relation to the subject matters referred to in said act of June 8, 1878;* for this statute expressly provides that "all general and special acts of such legislative assemblies heretofore passed, creating and providing for the government of towns, cities or other municipal corporations, and conferring such rights, powers and privileges upon the same as were necessary to their local administration, be and the same are hereby ratified, confirmed and declared to be valid, any law to the contrary notwithstanding; *subject, however, to amendment or repeal hereafter by such legislative assemblies.*" Note that all this legislation here referred to is subject to amendment or repeal hereafter by such legislative assemblies.

Note also the perfectly *neutral* character of the language in the same sentence which contains the language which this court held in *Lewis vs. Pima County* invalidated the coupons from the Pima County bonds there in question. The language is: "But nothing herein shall have the effect * * * to make *valid or invalid* any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation." This clause clearly left to the legislative assembly of the Territory the power to deal with this subject matter as being under its general legislative power. In other words, with any contracts or obligations *theretofore* made by any town, city or other municipal corporations the act of Congress of June 8, 1878, did not attempt to deal; but left this matter to

the legislative assemblies of the Territories. It did so under the language, "But nothing herein shall have the effect," &c. So also as to any such contracts or obligations *in the future* by the same language: "But nothing *herein* shall have the effect * * * to *authorize* any such corporation to incur hereafter any debt or obligation," &c.—it left to the legislative assemblies of the Territories the matter of authorizing debts or obligations in the future. The Congress of the United States had not at that time come to deal directly with the question of the wisdom and expediency of limiting the Territorial legislatures as to their power to authorize municipal corporations to incur indebtedness, and did not attempt to deal with such subject until the passage of the "Harrison act" of July 30, 1886, hereinafter referred to.

Act of Congress, June 8, 1878, a Curative Act.

This act of Congress of June 8, 1878, (reprinted in Appendix to this brief) was on its face clearly designed as *a healing or curative act;* and *so far as it was not a healing or curative act its language was, and was intended to be, perfectly neutral*, leaving the matter of positive legislation to the legislative assemblies of the Territories unfettered by any of its provisions. Section 1889 of the Revised Statutes of the United States, in force when the act of June 8, 1878, was passed, was as follows:

§ 1889. "The legislative assemblies of the several Territories shall not grant private charters or especial privileges, but they may by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other

industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association."

Prior to the act of June 8, 1878, it may have been suggested that some of the language of this section, to wit, "The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate," &c. (which clearly referred and was intended to refer only to the organization of private corporations), placed a limitation upon the legislative assemblies of the Territories so far as the creation and government of *towns, cities and other municipal corporations* were concerned. The object of passing the act of June 8, 1878, was, as shown in the title and on the very face of the Act itself, to remove any possible ground for such suggestion. As the legislative assemblies of the Territories had prior to June 8, 1878, assumed that no such prohibition existed, and had passed numerous general and special acts for the government of towns, cities and other municipal corporations, Congress, in recognizing the continued existence of the legislative power of the legislative assemblies of the Territories, validated all such acts, and as to the future left the matter of legislation for the discretion of the Territorial legislatures, merely providing that "nothing *herein*" (that is, in the act of June 8, 1878) should in and of itself and without any such future territorial legislation have the effect directly to "*authorize*" the towns, cities or other municipal corporations to incur any debt. This clause, "nothing herein," &c., so far from restraining the power

of the legislatures of the Territories, neither mentions the legislatures nor in any way refers to them or to their power. The whole subject therefore was open to future territorial legislation.

Section 1889, *supra*, was not the source of territorial legislative power. And the act of June 8, 1878, is simply explanatory of Section 1889, and does not touch upon or deal with the question of the extent of territorial legislative power under the Organic Act.

If Congress had intended in this act of June 8, 1878, to place any restriction upon the power of the legislative assemblies of the Territories, or to prohibit them from authorizing any such corporation to incur debts, it would have been as natural as it would have been easy for Congress so to provide, as it did later in the Harrison Act. The language would then have been somewhat as follows:

"*And hereafter the Legislature of any Territory shall not authorize any such corporation to incur hereafter any debt*," &c.; whereas the language that Congress used is that "nothing *herein* (that is, in the act of June 8, 1878) shall have the effect * * * to *authorize*." It makes no prohibition whatever upon the town, city or other municipal corporation, and it does not even mention the legislature or legislative power of the Territory. It does not repeal or disapprove of any of the many Territorial Railroad Aid Acts, and it does not deal with that subject at all. Its restrictive title, as well as the language of the text of the Act itself, shows that it had no purpose to restrict the legislative power of the Territories as it existed under the Organic Act.

Such was the status of the legislation of Congress at the time the Territorial act of February 21, 1883,

authorizing the issue of bonds by Pima County, was passed by the legislature of the Territory of Arizona. (Said Act of February 21, 1883, is reprinted at large in the Appendix hereto, *Post*, p. 61.) At that time the legislature of the Territory of Arizona had full power, under the organic act of the Territory and the general acts of Congress, to legislate on the subject contained in the said act. The act of Congress of June 8, 1878, contains no prohibition upon its authority to pass the act in question. The bonds were issued pursuant to the act and afterwards sold in the open market and purchased by the plaintiffs (Record, p. 2).

Numerous other Acts of Territorial Legislatures were passed (after the said Act of Congress of June 8, 1878) expressly authorizing the issue of railroad aid bonds by counties and other municipalities (see list in Appendix to this brief). Congress did not in any instance disapprove such acts; nor did Congress disapprove said Act of February 21, 1883, which authorized the Pima County bonds now in question.

We print in the Appendix to this brief a list of such other Acts of Territorial legislatures authorizing railroad aid bonds. This legislation shows what practical construction was placed upon the existing Acts of Congress (including said Act of June 8, 1878) by the Territories themselves. They evidently had no idea that said Act of June 8, 1878, contained any such prohibition as was decided in the *Pima County Case*.

"Harrison Act," July 30, 1886, first time any prohibition or limit was placed by Congress upon Territorial legislatures authorizing issue of railroad aid bonds.

Afterwards Congress passed what is commonly called the "Harrison act," entitled "An act to prohibit the passage of local or special laws in Territories of the the United States, to limit Territorial indebtedness, and for other purposes," approved July 30, 1886 (24 Stat., 170). This act expressly provides (sec. 2)·

"That no territory of the United States now or hereafter to be organized, or any political or municipal corporation, or subdivision of any such territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association."

This, we respectfully submit, is the first time that Congress ever prohibited the legislatures of the Territories from authorizing municipal corporations to aid in the construction of railroads by issuing their bonds for that purpose.

If the *Pima County Case* was rightly decided, the said Act of June 8, 1878, above discussed contained such a prohibition, and the above prohibition in the "Harrison Act" was surplusage. No! The Harrison Act was the *first* prohibition to the territorial legislatures to authorize municipal aid to railroads.

This accords with the general understanding as is shown by the fact that the legislatures of several of the Territories had, both before and after the said act of June 8, 1878, passed numerous statutes authorizing the

issue of railroad aid bonds by counties and other political subdivisions of such Territories, and also shown by the printed report made by the Senate Committee of which Senator HARRISON was chairman, at the time the Harrison act was passed. Parts of this report are printed in the Appendix to this brief *(Post*, p. 56*)*. In view of this general understanding, and in view of the acts which had been passed by the legislatures of many of the Territories authorizing the issue of railroad aid bonds and the issue of such bonds, it is perhaps not too much to say that the decision of this Court in *Lewis vs. Pima County* was a surprise to the legislatures and to the members of the profession who had occasion to consider and deal with the matter.

Legislative History of "Harrison Act" of Congress of July 30, 1886.

We proceed to give the history of this act of July 30, 1886, and to show that Congress in enacting it treated all indebtedness of the Territories and of the counties and other political subdivisions of the Territories *down to that time as valid, including indebtedness incurred by the issue of railroad aid bonds* as well as all other forms of indebtedness.

The bill for the act of July 30, 1886, was introduced into the House of Representatives by MR. SPRINGER, of Illinois (Congressional Record, vol. 17, pt. 1, p. 1043). The bill so introduced is printed in volume 17, part 4, page 4062, and is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legislatures of the Territories of the United States now or hereafter to be organized

shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Regulating the jurisdiction and duties of justices of the peace, police magistrates, and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village.

Providing for the election of members of the board of supervisors in townships, incorporated towns, or cities.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties, or forfeitures.

Creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association, or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof.

Sec. 2. That it shall be the duty of the legislative assemblies of the several Territories to pass such general laws as may be necessary for the government of their respective Territories not inconsistent with acts of Congress or the constitution of the United States.

Sec. 3. That all acts and parts of acts hereafter passed by any Territorial legislature in conflict with the provisions of this act shall be null and void.

This bill was read three times and passed by the House, and went to the Senate and was there read twice and referred to the Committee on the Territories (Cong. Rec., vol. 17, pt. 4, p. 4094). The bill was reported June 15, 1886, by Senator HARRISON from the Committee on Territories with amendments, and a report thereon accompanied the same, which report was ordered printed. We have obtained a copy of this report and print parts of the same in the Appendix to this brief. To that report was annexed an appendix containing letters and statistics furnished by the Governors of the several Territories to Senator HARRISON as chairman of the Senate Committee on Territories. These letters and statistics show indebtedness of the Territories and of the counties and municipalities therein incurred for various purposes, among others *indebtedness incurred by the issue of railroad bonds.* We quote, for example, from the statistics regarding the Territory of New Mexico :

Grant County, railroad aid bonds	$57,000
Municipal indebtedness, railroad bonds	46,800
Santa Fe County, railroad bonds	150,000

The Governor of the Territory of Washington states in his letter : " The bonded indebtedness of Thurston County was incurred in aid of railroad construction." The accompanying table shows that the amount thereof was $75,000.

When we come to the TERRITORY OF ARIZONA we find, among other items of indebtedness, " Bonded indebtedness January 1, 1885, Pima County, $204,750." **This amount included the very bonds involved in this suit.** So, also, the bonded indebtedness of Yavapai County is stated as $169,000, and that of Maricopa County is stated as $100,000, both of such amounts

including bonds issued in aid of railroads under express statute authority given by the legislative assembly of the Territory of Arizona *(Post*, p. 65*)*.

The Senate Committee, therefore, in reporting with amendments the bill introduced into the House by Mr. SPRINGER, proposed to *deal with the debt situation as it actually existed in the Territories.* This appears clearly from their report above quoted. They did not propose to interfere with what had been done in the past under Territorial legislation; but, on the contrary, to recognize such Territorial legislation and any indebtedness already incurred thereunder as valid. But what they did seek to do was to enact a statute in the nature of a constitutional limitation upon Territorial legislative power in the future. To this end, as they stated in their report, they made several important amendments to the bill introduced into the House by Mr. SPRINGER. These amendments were made by adding the following sections, to wit:

"SEC. 2. That no Territory of the United States now or hereafter to be organized, or any political or municipal corporation or sub-division of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association.

"SEC. 3. That no law of any Territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the Territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such Territory, if the total indebtedness of the Territory is not thereby made to exceed one per

centum upon the assessed value of the taxable property in such Territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county, or other sub-division therein.

"SEC. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void.

"SEC. 5. That section eighteen hundred and eighty-nine, title twenty-three, of the Revised Statutes of the United States be amended to read as follows:

"'The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue) loan, trust, and guarantee associations, and for the construction or operation of rail-roads, wagon-roads, irrigating ditches, and the colonization and improvements of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association.'

"SEC. 6. That nothing in this act contained shall be construed to abridge the power of Congress to annul any law passed by a Territorial legislature, or to modify any existing law of Congress requiring in any case that the laws of any Territory shall be submitted to Congress."

The amendments proposed by the Senate Committee on Territories were adopted by the Senate (Cong. Rec., vol. 17, pt. 6, p. 5825), and the Senate requested a conference with the House. These Senate amendments

did not enact Section 4 in its present form, but only the first half of said section, to wit :

" That no political or municipal corporation, county or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness ; and all bonds or obligations in excess of such amount given by such corporation shall be void."

The House referred the bill with amendments of the Senate to the Committee on Territories and ordered the amendments printed (Cong. Rec., vol. 17, pt. 6, p. 6014). Afterwards, the House Committee on Territories made a report recommending that the House concur in *certain* of the Senate amendments, but not in the Senate amendment adding Senate sections 4, 5 and 6, and recommending that the request for a conference on the said amendments be granted, and the House passed a vote to that effect. The Conference Committee united in a joint report, which was presented by the Senate members in the Senate, among other things, making the following addition to section 4 as it was proposed by the Senate, said addition being as follows, to wit :

" That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any

bonds heretofore issued or contracted to be issued" (Cong. Rec., vol. 17, pt. 7, p. 7250).

The Senate agreed to this report *(Ib.)*.

The House Committee similarly made a report which was adopted by the House (Cong. Rec., vol. 17, pt. 7, p. 7330). The bill was thus passed and became a law as amended. The above words in full-face type became part of section 4 of the Harrison Act, so that as finally enacted said section of the "Harrison Act" reads as follows:

"SEC. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: **That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued."**

That Congress regarded this clause in said section 2 of the act of July 30, 1886, as the first prohibition upon the issue of railroad aid bonds is evident both from the above-quoted saving clause in section 4 itself and from the report of the Senate Committee accompanying its proposed amendments to the bill. Note carefully the language of

this saving clause: "Nothing in this act contained shall be so construed as to affect the validity of any act of any Territorial legislature heretofore enacted, or any obligation existing or contracted thereunder." In other words, the prohibition in the said section 2 of the Harrison Act (which prohibition Congress understands is going to effect them for the first time) is not to interfere with the validity of any act of the Territorial legislature theretofore passed, but such acts and the obligations issued or contracted thereunder are to stand as valid. It may be urged that the language of this clause quoted from section 4 is neutral; but the purpose of this clause, taken in connection with the other provisions of the act, and the facts as to outstanding railroad aid bonds in the Territories, as shown in Senator HARRISON'S printed report, clearly was to recognize as valid acts of Territorial legislatures theretofore enacted and bonds issued thereunder.

We say it may possibly be urged that the language of this clause quoted from section 4 is neutral, "That nothing in this act contained shall be so construed as to affect the validity," &c. But this language is in this respect precisely the same as the language of the act of June 8, 1878, which this court referred to and made the basis of its decision in the case of *Lewis vs. Pima County*, 155 U. S., 54. To make this perfectly plain we quote the clauses in question in parallel columns:

"But nothing herein shall have the effect to create any private right except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs" (Act of June 8, 1878).

"That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, *nor to preclude the issuing of bonds already bontracted for in pursuance of express provision of law*, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued" (Harrison Act of July 30, 1886).

The clause in the act of 1886 is no more neutral than the clause in the act of 1878. If the language in the act of 1878, "But nothing herein shall have the effect * * * to authorize," is a prohibition, then the clause in the act of 1886, "That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder," is a validation.

But it is not merely negative and neutral. On the contrary it expressly sanctions the future issue of railroad bonds under existing contracts. This is in plain conflict with the proposition that the said Act of June 8, 1878, forbade such bonds, that is to say in plain conflict with the *Pima County case*. These considerations were not presented to this Court in the *Pima County case* briefs.

That the Harrison Act of Congress of July 30, 1886, treated as valid or validated all bonds and other obligations issued under statutes enacted by Territorial legislatures is further evident from the fact that the said act of June 8, 1878 (20 Stat., 101), **is by reference made a part of the said Harrison Act of July 30, 1886, and this last act provides :**

" That nothing in this *act* contained shall be so construed as to affect the validity of any act of any Territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder; nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any Territorial legislature from legalizing acts of any county, municipal corporation or subdivision of any Territory as to any bonds heretofore issued or contracted to be issued."

This proposition is evident from a brief consideration of the statutes in question. If Congress had prohibited such legislation in the said Act of June 8, 1878, can we suppose that it would have allowed the Territorial legislature to legalize such prohibited bonds ?

This act of July 30, 1886 (sec. 5), amends section 1889 of the Revised Statutes so as to read as follows :

" The legislative assemblies of the several territories shall not grant any private charters or special privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate for any mining, manufacturing and other industrial pursuits, *and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust and guarantee associations,* and for the construction and operation of railroads, wagon roads, irrigation ditches and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any other benevolent, charitable or scientific association."

The words in italic are new.

The act of June 8, 1878 (20 Stat., 101), above quoted is not expressly referred to in this section 1889 as amended by section 5 of the act of July 30, 1886; but this act of June 8, 1878, is nevertheless carried over into section 5 the same as if it had been there set forth at length. It is a part of section 1889 of the Revised Statutes and of the act of July 30, 1886, or it is nothing. The language of the clause from section 4 above quoted is:

"That nothing in this *act* contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law," &c.

It follows that the last clause of the act of June 8, 1878, contained in section 1889 of the Revised Statutes and in the act of July 30, 1886—to wit, "but nothing herein contained shall have the effect * * * to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs," is "not to be so construed as to affect the validity of any act of any territorial legislature heretofore [that is, before July 30, 1886] enacted;" **that is to say, shall not be construed to affect the validity of the Territorial act of February 21, 1883, under which the Pima county bonds were issued.**

For the purposes of the argument here stated, it is immaterial whether the act of June 8, 1878, is to be regarded as incorporated in section 1889 of the Revised Statutes of the United States, or merely as ex-

planatory of said section. In either case it is to be read as a part of said section.

Section 4 of the Harrison Act of July 30, 1886, provides:

"That nothing in this *act* contained shall be so construed as * * * to prevent any territorial legislature from *legalizing* the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued."

In other words, immediately after the passage of the Act of Congress of July 30, 1886, the legislature of the Territory of Arizona might have said: "We hereby legalize the act of Pima county in issuing these bonds;" but, as these bonds were issued under and pursuant to the express authority of the act of the territorial legislature, approved February 21, 1883, no validating act of the territorial legislature would have appeared other than as a useless repetition, because Congress in the preceding sentence recognized the validity of such act of February 21, 1883, as an act of a territorial legislature enacted before July 30, 1886, under which the Pima County bonds had been issued.

The language is: "Nothing in this act contained shall be so construed as * * * to prevent any Territorial legislature from *legalizing* the acts of any county * * * as to any bonds heretofore issued. * * *" That is, the last clause of the act of June 8, 1878, contained in section 1889 of the Revised Statutes of the United States, and in the Harrison Act of July 30, 1886 (to wit, "But nothing herein shall have the effect * * * to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs), is "not to be so construed as to prevent

any Territorial legislature from legalizing the acts of any county * * * as to any bonds heretofore issued." * * *

That the United States Senate regarded section 2 in said Harrison act of July 30, 1886, as being the *first* enactment of Congress which prohibited the Territorial legislatures from authorizing the issuance of railroad aid bonds by counties or other political subdivisions of the Territories is evident from the Report (printed in Appendix to this Brief) made by Senator HARRISON as Chairman of the Committee on Territories after he had investigated the matter of the outstanding Territorial indebtedness, and the question of the proper legislative action by Congress:

"Most of our State constitutions contain some limitation upon the power of municipalities to loan their credit and to create municipal debts. **The people of the Territories have no such protection against improvident subscriptions to the stock of corporations** or the reckless creation of municipal debts. As a result, several of our territories have already incurred large territorial debts, and many of the counties and towns have incurred an indebtedness much beyond the limits of prudence."

Again, the report says:

"The first of the added sections prohibits any of the Territories, or any political or municipal corporation or subdivision of any Territory, *from making any subscription to the capital stock of any incorporated company or association, and from loaning its credit to any such company.*"

Case of Lewis vs. Pima County was apparently decided without any consideration of the legislation and legislative history above set forth.

None of the briefs before this court in the case of *Lewis vs. Pima County*, 155 U. S., 54, refers in any way to these important and, indeed, controlling provisions of the "Harrison act" of July 30, 1886, or to the legislative history of the provisions of the said act, which is set forth in this brief. Neither does the opinion of this court in the said case of *Lewis vs. Pima County* even mention the said Harrison act of July 30, 1886. Apparently the importance of these provisions of the act of July 30, 1886, and of this legislative history was not presented by counsel in that case (certainly not in their printed briefs), nor considered by this court.

On this showing we respectfully submit that that case was decided by this court on a point which was not fully argued or presented or *fully* considered by the court in its opinion, and that if the foregoing considerations had been presented, the court must necessarily have arrived at a different result.

We have here stated the foregoing argument concerning the correctness of the decision in the case of *Lewis vs. Pima County*, 155 U. S., 54, not for the purpose of asking this court to reverse its decision in that case. We are well aware of the fact that our opponents may say that this might have been a good argument to address to the court when the case of *Lewis vs. Pima County* was under consideration, but that such argument is too late now, for the matter of the validity of the bonds has been decided and become *res adjudicata*. While we do not assent to any suggestion that the matter is made *res adjudicata* by the case of *Lewis*

vs. Pima County; yet we have made the foregoing argument, not for the purpose of having this court reverse its decision in the case of *Lewis vs. Pima County,* but in order to show to this court the true history, meaning and purpose of the legislation of Congress with reference to the issue of railroad aid bonds by counties or other municipalities in Territories, and particularly in the Territory of Arizona. This has an important bearing in showing why Congress, after the decision of this court in *Lewis vs. Pima County* passed the act approved June 6, 1896, hereinafter referred to, validating railroad aid bonds issued by counties in Arizona, including those issued by Pima County, some of the coupons of which had been in question in the case of *Lewis vs. Pima County,* 155 U. S., 54.

The Funding and Curative Act of June 6, 1896 (29 Stats., 262), Considered.

We proceed now to a consideration of the said act of June 6, 1896.

The case of *Lewis vs. Pima County* was decided in this Court October 29th, 1894. In the light of this decision, and by reason of it, and to cure the defect pointed out by the Court (as is evidenced by the memorial to Congress passed by the Legislative Assembly of the Territory of Arizona in 1895, quoted below in the decision of the Supreme Court of the Territory in the case of *Coconino County vs. Yavapai County,* 52 Pac. Rep., 1127), Congress on June 6th, 1896, enacted the following (29 Stat., 262):

"*An Act amending and extending the provisions of an Act of Congress, entitled 'An Act approving with amendments the funding Act of Arizona,' approved June*

25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the Acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the Act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding Act approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this Act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the Act of Congress approved June 25th, 1890, and the Act amendatory thereof and supplemental thereto approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this Act provided until January 1st, 1897: *Provided*, That nothing in this Act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this Act approved, confirmed and made valid, and authorized to be funded.

"Approved June 6, 1896."

Note the language of the foregoing act approved June 6, 1896 (sec. 2):

"All bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated."

The words "as hereinbefore authorized to be funded" refer to the provisions of section 1 of the said act, to wit:

"All outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid act approved June 25, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded * * * *."

The Supreme Court of the Territory of Arizona has decided that this Act of June 6, 1896, has validated similar railroad aid bonds of another county in Arizona.

Coconino County vs. Yavapai County, 52 Pac. Rep., 1127.

The said Yavapai County railroad aid bonds were issued under an act of the Territorial Legislature of Arizona, entitled "An Act to aid in the construction of a railroad in Yavapai County," approved March 12, 1885.

We here print in full the decision in that case:

Coconino County vs. Yavapai County.

[Reported, 52 Pac. Rep., 1127.]

(Supreme Court of Arizona, April 16, 1898.)

DIVISION OF COUNTY—LIABILITY ON BONDS.

Bonds were issued by Y. county, under the act of the 13th legislative assembly of March 12, 1885, in aid of a railroad. Y. county was subsequently divided by the act of the legislative assembly of February 19, 1891, into Y. and C. counties, C. assuming a portion of the indebtedness of Y., for which indebtedness it issued its bonds, which were sold or exchanged for territorial funding bonds. Act Cong., June 6, 1896, provided (section 2) that all bonds theretofore issued under the authority of the legislature of Arizona were thereby confirmed, approved and validated. An action was subsequently brought by C. to recover money paid to Y. upon such portion of its bonds as represented its portion of the indebtedness of Y. on the railroad bonds, on the ground that such bonds were unauthorized and void. Held, that the railroad bonds were validated by the act of congress, supra, and that, since plaintiff was a part of Y. at the time the bonds were issued, it not appearing that Y. had been released from liability thereon, plaintiff would be liable for its share of the bonds, and a demurrer to the complaint was properly sustained.

Appeal from District Court, Yavapai county, before Justice RICHARD E. SLOAN.

Action by Coconino county against Yavapai county. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

E. S. CLARK, Dist. Atty., and EDWARD M. DOE, for appellant; H. D. ROSS, Dist. Atty., and R. W. O'SULLIVAN, Asst. Dist. Atty., for appellee.

STREET, C. J.: The 13th legislative assembly of Arizona, on the 12th day of March, 1885, passed an act to aid in the construction of a railroad in Yavapai county, which authorized the issuance of bonds on the faith and credit of Yapavai county, to the amount of

$4,000 per mile, for the construction of a railroad from a point near Chino station, on the Atlantic & Pacific Railroad, to Prescott, and to the northern boundary of Maricopa county. Soon thereafter was constructed the Prescott & Arizona Central Railroad from a point near Chino station called Seligman, to the City of Prescott, all in Yavapai county, Ariz., and the bonds of Yavapai county were issued to the company constructing said railroad to the number of 292, and in the denomination of $1,000 each. At that time the territory now embraced in Coconino county was a part of Yavapai county. The 16th legislative assembly of Arizona, on the 19th of Febeuary, 1891, created the county of Coconino out of certain territory then belonging to Yavapai county. By the act creating the county of Coconino it was provided that one-third of the indebtedness of Yavapai county, less $25,000 (the same being one-third of the estimated valuation of the public improvements in said county of Yavapai at the time of the passage of the act), shall be assumed and paid by the county of Coconino to the county of Yavapai, and that the county of Coconino should issue to the county of Yavapai negotiable coupon bonds covering all indebtedness, bearing interest at the rate of 7 per cent. per annum, and that said bonds should be delivered to the treasurer of Yavapai county, and Yavapai county was authorized to take, own and hold the said bonds, and, through its board of supervisors, dispose of and transfer the same to the benefit of said Yavapai county. In compliance with said act the boards of supervisors of the respective counties met at the city of Prescott, and ascertained the amount of indebtedness of Yavapai county as it existed on the 19th day of February, 1891, the date of the passage of said act, to be the sum of $533,926.50, and the proportion of said indebtedness belonging to Coconino county to be the sum of $152,975.50. Thereafter, on the 2d day of June, 1891, the said board of supervisors of Coconino county made, executed and delivered to Yavapai county 153 negotiable bonds dated May 1, 1891, bearing interest at the rate of 7 per cent. per annum, interest payable annually on the 2nd day of January of each year. Each of said bonds, except the last one, numbered 153, was for the principal sum of $1,000, and said bond numbered 153 was for the principal sum of $975.59. It is alleged by plaintiff that on the 19th day of February, 1891, the sum of $294,-

779.84, which was included in the total amount of indebtedness of Yavapai county, was for and on account of the bonds which had been issued and delivered to the Prescott & Arizona Central Railroad Company, under and by virtue of the act of the 13th legislative assembly aforesaid, that the said act of the 13th legislative assembly was void, and that the sum of $98,-259.32 is the proportion which Coconino county assumed to pay to Yavapai county of said void bonds. This action was brought by Coconino county to recover the said sum of $98,259.32, together with interest thereon, which Coconinc oounty had paid to Yavapai county from the date of said bonds to the 15th of January, 1895. To this complaint, the defendant, Yavapai county, filed a demurrer, which the district court of Yavapai county sustained, and rendered judgment thereon in favor of the defendant, from which judgment the plaintiff appeals to this court. The questions raised by the plaintiff in his brief are: First. Whether the bonds given by Yavapai county in aid of the Arizona Central Railroad Company were void when issued; second, whether, if then void, the act of congress entitled "An act amending and extending the provisions of congress entitled 'An act approving with amendments, the funding act of Arizona, approved June 25th, 1890, and the act amendatory and supplemental thereof, approved August 3rd, 1894,'" approved June 6, 1896, is applicable to said bonds. Whether or not the act of March 12, 1885, of the 13th legislative assembly, authorizing Yavapai county to issue bonds for the construction of said railroad, was within the power of the legislature to enact, or whether the bonds that were issued in pursuance of said act were originally valid or not, this court does not feel called upon to decide, for the view we take of the matter is that the validity of the bonds is to be determined by the act of congress approved June 6, 1896, section 2 of which is as follows: "That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona, under the provisions of the act of congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3d, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said territory as hereinbefore au-

thorized to be funded are hereby confirmed, approved and validated, and may be funded as in this act provided until January first, 1897, provided that nothing in this act shall be so construed as to make the government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this act approved, confirmed and made valid and authorized to be funded." Under that act all bonds which had been issued by virtue of the territorial legislative enactments were permitted to be funded in territorial funding bonds. The act of congress aforesaid made valid all of the bonds which were issued under the legislative act of March 12, 1885. That the act of congress was intended to meet the question of bonds issued under the legislative act of March 12, 1885, is made more certain, and the construction of the language of it becomes more easy of interpretation, under the history which surrounds its passage. The territorial legislative assembly of 1895 passed a memorial asking congress for an enactment of some such law, the text of which memorial is as follows: Whereas, under the various acts of the legislative assembly of the territory of Arizona, certain of the counties of the territory were authorized to issue in aid of railroads and other *quasi* public improvements and did under such acts issue bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons, who, in good faith invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are innocent holders of the same; and whereas, the validity of these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and whereas there has recently been raised a question as to whether these acts of the legislative assembly were valid under the organic law of the territory, which had led to a movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and whereas, we believe that such repudiation would, under the circumstances, work great wrong and hardship to the holders of such bonds, and at the same time seriously affect the credit and standing of our people for honesty and fair dealing and bring us into disrepute; wherefore we most strongly urge upon your most hon-

orable bodies the propriety and justice of passing such curative and remedial legislation as will protect the holders of all bonds issued under the authority of acts of the legislative assembly, the validity of which has heretofore been acknowledged, and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and relieve the people of the territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the territory, and that you may so further legislate as to validate all acts of the legislative assembly of the territory which have held out inducements for the investment of capital within the territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the territory, and thus relieve the honest people of the territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people. Resolved, that our delegate to congress be, and he is hereby, instructed to use all honorable means to bring this subject to the earnest consideration of congress; that the secretary of the territory be, and he is hereby, requested to transmit a copy of the foregoing to each house of congress, and to our delegate in congress." Another reason why the demurrer was properly sustained is that the plaintiff alleges that many of the said 153 bonds, covering the amount of $98,259.32 executed and delivered by Coconino county to Yavapai county have been sold and delivered to divers and sundry persons, and the remainder exchanged for territorial funding bonds, under the territorial funding act and the act of congress providing for the funding of territorial and county indebtedness; and it was shown by the complaint that the same had been done before this action was brought, and failed to show any other condition than that the obligation of Yavapai county on the bonds issued by it to the Prescott & Arizona Central Railroad Company was outstanding and remained as a Yavapai county liability and indebtedness. For aught this court knows, there may be already a judgment against Yavapai county, making it compulsory upon that county to pay these railroad bonds. Until Yavapai county is relieved of its obligation to pay the bonds issued by it for the construction of the railroad, Coconino county, which was a por-

tion of Yavapai county at the time the bonds were issued, must be held to bear its portion of the burden. The judgment of the district court is affirmed.

DAVIS and DOAN, JJ., concur. SLOAN, J., having been Judge in court below, did not sit in this case in supreme court.

Note the definiteness of the language both of section 2 and of section 1, of the said Act of Congress of June 6, 1896. It is not "all bonds," but "all bonds heretofore issued *under the authority of the legislature* of said territory;" not all bonds which had been issued by authority of law generally, but all bonds which the legislature of the Territory has expressly said might be issued. This points definitely to a legislative act of the Territory, and says that wherever bonds have been issued under such legislative act, and are outstanding at the time of the passage of the act of June 6, 1896, the same are "confirmed, approved and validated."

Note also the precision and definiteness of the language of section 1 of this act: All outstanding bonds of the counties "authorized by *legislative enactments* of said Territory * * * shall be funded." These provisions of this act of Congress of June 6, 1696, were clearly intended to validate all bonds issued by the Territory, or by the counties, municipalities and school districts thereof, down to that time, wherever there had been an act of the Territorial legislature authorizing their issue and the bonds had been issued. This act of Congress does not say that all bonds are validated which have been issued *in accordance with the acts of Congress*, nor in accordance with the acts of Congress *and* acts of the Territorial legislature. Such bonds would have needed no validation, and the words would have been ineffective and meaningless. "The

whole need no physician : but they that are sick." What the act sought to do and did do was to validate all bonds which had been issued pursuant to acts of the legislature of the Territory of Arizona, but which were invalid because not issued in accordance with the acts of Congress. Clearly, Congress might have given to Pima County direct authority to issue these bonds precisely as they were issued. What it has done is to make valid such bonds after they have been issued under authority of a legislative enactment of the Territory of Arizona, and the bonds are thus made valid although any prior act of Congress may have rendered them invalid.

Congress has power to pass the foregoing Curative Acts.

It is hardly necessary to make any argument before this court that Congress has full and absolute power thus to legislate for the Territories. Congress has as much absolute right to govern the Territory of Arizona, or any county therein (for example, Pima County), directly and absolutely, and without consulting the Territory or the county, as it has to govern the District of Columbia. Congress has as much right to exercise this control over the affairs of Pima County and over the incurring and validating of indebtedness of such county as it has over the incurring and validating of indebtedness of the District of Columbia. Congress is not obliged to consult either the people or any local officers either in the one case or the other. Indeed, Congress might abolish or change in any way that it sees fit any of the Territorial governments, and nobody in the Territory could legally complain.

There are numerous decisions of this court in which it has thus stated the character and extent of the authority of Congress over the Territories and of the political subdivisions thereof. It is sufficient to refer to the case of the *First National Bank of Brunswick vs. County of Yankton*, 101 U. S. 129, in which case it appeared that an act of Congress had validated $200,000 bonds of Yankton County, Dakota Territory, which would have been invalid but for such act of Congress. This court in that case, Mr. Chief Justice WAITE giving the opinion, said (p. 132):

"It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat. 50) is chap. 8 of the first session of the first Congress, and the ordinance itself was in force under the confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political sub-divisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

"In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and con-

tinues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States."

The general principle is well settled that subsequent legislative ratification of acts of a municipal corporation is equivalent to original legislative authority. We need cite no authority for this proposition.

We refer, however, to a few authorities:

"In the absence of special constitutional restrictions the competency of the legislature to enact retrospective statutes, to validate an irregular or defective execution of a power by a municipal or public corporation is undoubted. And the power to cure defective subscriptions to the stock of railway companies and to validate bonds issued therefor has been frequently exercised and judicially sustained. Subsequent legislative sanction within constitutional limits is equivalent to original authority."

Dillon, Mun. Corp., 4th Ed., Sec. 544.

"There is no doubt of the right of the legislature to pass statutes which reach back to and change or modify the effect of prior transactions."

Cooley, Const. Lim., p. 370.

"We have already referred to the case of contracts by municipal corporations which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract is one which the legislature might originally have authorized the case falls within the principle above laid down and the right of the legislature to confirm it must be recognized. This principle is one which has very often been acted upon in the case of municipal subscriptions to works of internal improvement, where the original undertaking was without authority of law,

and the authority given was conferred by statute retrospectively."

Id., p. 379.

In *New Orleans vs. Clark*, 95 U. S., 644, it was claimed that the bonds issued were invalid because the City had exceeded its authority by law to issue them. One of the questions presented was:

"Whether it was competent for the legislature of Louisiana to legalize the issue of the bonds if for any cause they were originally invalid."

The Court answers in the affirmative and says:

"The books are full of cases where claims, just in themselves, but which from some irregularity or omission in the proceeding by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured."

In *Read vs. Plattsmouth*, 107 U. S., 568, the Court held the bonds to be valid, and the question was whether the issue of bonds can be supported by the subsequent legislation which sought to cure the defects of their origin. It was held that the curative act was not forbidden by the constitution of Nebraska as retroactive laws are not forbidden, and that the clause that no *ex post facto* law, or any law impairing the obligations of contracts, shall ever be passed does not include legislation of the class in question.

Bolles vs. Brimfield, 120 U. S., 759, and *Anderson vs. Santa Anna*, 116 U. S., 356, hold that:

"Subsequent legislative ratification of the acts of a municipal corporation, which might lawfully have been performed under legislative sanction in the first instance, was equivalent to original authority."

Congress had power to validate the Pima County bonds after the decision in the case of Lewis vs. Pima County as well as before.

The fact that this court had decided in *Lewis vs. Pima County* against the validity of certain coupons detached from these bonds, which coupons were in suit in that case, did not operate to prevent Congress from validating such bonds. If the bonds were invalid at all they were invalid before that decision as well as after that decision. The judgment merely decided that the plaintiff in that case could not recover on the coupons. The judicial declaration of this fact did not add anything to the invalidity of the bonds. It merely stated a fact which already existed. Congress had just as much power to validate these bonds after the decision in the case of *Lewis vs. Pima County* as before that decision. The precise proposition involved in the validation of these bonds is as follows: That Congress at the time of the passage of the validating act had absolute power of legislation over Pima County, and it could declare and provide that bonds which had been issued by Pima County should be valid and treated as such. Congress had this power after the decision in the case of *Lewis vs. Pima County* the same as before that decision. The act of Congress validating these bonds does not in any way attempt to trespass upon the functions of the courts which had decided certain coupons therefrom invalid. It is the function of the court to decide controversies upon the facts and legislation as they exist at the time the decision is rendered. If the facts and legislation change after the decision is rendered then a new and different

case is presented, and the former decision of the court has no application. Congress has full power to legislate for the Territories just as much after a decision of the courts regarding previous congressional legislation as it had in making such previous legislation. The fact that in the meantime the courts have declared what the previous legislation means does not prevent Congress from making any new provisions which it deems best regarding Territories, or any of their political subdivisions. If this were not the law, then one decision of the courts regarding a matter would put the legislation of Congress on the subject at a standstill.

It is eminently proper that, when the bonds of a government have been issued and afterwards bought and sold in the market in good faith, the legislative branch of the government should remedy any defect, or supposed defect, in the method of issuing such bonds, or validate such bonds where they have been issued without authority. So, also, it is proper for any government, when any political subdivision of such government has similarly issued its bonds, to remedy any defects in such bonds, or validate them if they have been issued without authority. In such case the government, being the promisor in such obligations, or (what is the same thing) having some political subdivision which is the promisor in such obligations, says in effect to its creditor and to its own officers, "These bonds shall be paid." In other words, Congress, in passing the validating act of June 6, 1896, was in the position of a debtor who says, "I will not insist on my legal right to defend against these obligations, but I will pay my debts," or (what is the same thing) says, "a part of myself—namely, the County of Pima, in

the Territory of Arizona—over which county I have absolute control, shall not insist upon any legal defense to these Pima County bonds, but shall pay these bonds." This is merely the debtor, or the sovereign which controls the debtor and of which the debtor is a part, waiving the right to insist on some legal defense against its obligations, and providing that they shall be paid according to their terms. That there is no objection to Congress taking this position in regard to the matter affecting a part of the territory of the United States is obvious, and no authority is needed to support it. This court has decided this principle as to public lands which were given as a bonus to aid in the construction of railroads through States and Territories. The same principle applies in the case of an issue of bonds granted in aid of the construction of a railroad. The cases to which we refer are *United States vs. Winona and Saint Peter Railroad Company* 165 U. S., 463; *United States vs. Union Pacific Railway Company*, 165 U. S., 482, and other cases. The facts in those cases were substantially as follows: Congress passed certain acts making grants of lands to the Pacific Railroad companies and to other railroad companies in aid of the construction of their railroads. Afterwards this court in the case of *Kansas Pacific Railway Company vs. Dunmeyer*, 113 U. S., 629, decided that certain lands did not pass under the railroad grant, because at the time of the filing of the map of definite location they were on the records of the Interior Department claimed under homestead and preëmption entries. Nevertheless, prior to that decision many lands thus located had been sold by the railroad companies and come into the hands of purchasers who paid value for them. The legal title to

these lands, however, under the decision in *Kansas Pacific Railway Company vs. Dunmeyer, supra*, remained in the United States. Here, then, were acts of Congress granting certain lands; a decision of this court to the effect that the lands in question were not embraced in the grant; nevertheless, afterwards Congress undertook to legislate and to confirm and vest in the holders of these lands the legal title which this court had decided in *Kansas Pacific Railway Company vs. Dunmeyer, supra*, was in the United States and not in such holders. And this later legislation was expressly held valid, and held to govern the matter in the said case of *United States vs. Winona and Saint Peter Railroad Company, supra.*

It is the duty of the defendants to fund these Pima County bonds by issuing the Funding bonds of the Territory therefor as provided in the Acts of Congress and of the legislature of said Territory, and the writ of mandamus as sought by the relator should have been awarded.

The history of the funding acts of Arizona and of Congress may be briefly re-stated as follows:

In 1887 the Territory enacted a Funding Act, Chap. XXXI., R. S. Ariz., Sec. 2053-2067, reprinted Appendix p. 72. This is the Territorial Act which Congress amended by the Act of June 25, 1890, referred to below.

This chapter (XXXI.) authorizes the funding of Territorial and County indebtedness by the Loan Commission. It was the law in force June 25th, 1890, when Congress came to the relief of the Territory and the counties because the limitations in sections 3 and

4 of the so-called "Harrison Act" conflicted with the operation of said Act, and a large amount of indebtedness was outstanding which was beyond the limits of said "Harrison Act," and Congress amended said Funding law by the Act of June 25, 1890 (Reprinted in Appendix hereto. *Post, p. 78*). It is entitled "An Act approving with amendments the funding Act of Arizona." The very first words are: "*That the Act of the Revised Statutes of Arizona of 1887, known as 'Title XXXI.—Funding,' be and is hereby amended so to as to read as follows, and that as amended the same is hereby approved and confirmed subject to future territorial legislation.*"

Then Congress proceeded to amend the said Territorial act, keeping the title, paragraph numbers, &c., the same as in the statute enacted by the Territorial legislature. In other words, Congress took this funding act of the Territorial legislature, made some changes in it, and handed it back to the Territory, and expressly provided that this act is "*subject to future Territorial legislation.*" Mark the unusual and important words: "**Subject to future Territorial legislation.**" This not only recognized, but expressly delegated to the Territory of Arizona, in view of the local situation in that Territory, full power to legislate further on the subject of funding Territorial and municipal indebtedness. Such future legislation by the Territory was had in the Act of March 19, 1891, which is referred to below. The clause, "*subject to future Territorial legislation,*" means that the Territory is empowered so to legislate. It is positive delegation of the power so to do if the territory needed such authority in addition to its general authority. It gives the Territory power to legislate *in regard to*

this very matter if special authority were needed. The precise, specific, thoughtful purpose of this provision was to prevent its being held that Congress having legislated on the subject such legislation excluded further or other Territorial legislation. It is more: it is a grant of power to the territory so to legislate, if such power did not otherwise exist.

Accordingly, the Territory enacted the Act of March 19, 1891 (Laws of 1891, p. 120, printed in the Appendix to this brief). This Act re-enacts the above Act with some additions hereinafter mentioned, and said Territorial Act of 1891 has been in force ever since. It has never been annulled or disapproved by Congress.

The Act of Congress of August 3, 1894 (printed in Appendix) and the said Act of June 6, 1896, only amend Section 15 of the Act of June 25, 1890. That section limited funding to certain indebtedness. Such limitation was changed by the Acts of Congress of August 3, 1894, and June 6, 1896, but in other respects the said funding Act remained unchanged, except by said Act of the Territory of Arizona of March 19, 1891.

The said Act of Congress of June 25, 1890 (26 St., p. 175), subject to future legislation by the Territory creates the loan commissioners of Arizona and prescribes their duties. It provides for the payment of existing indebtedness by issuing bonds at a lower rate of interest.

In detail the said Act of June 25, 1890 *(post, p. 78)*, describes how the bonds are to be made and provides for a tax. Section 10 provides that the loan Commissioners—

"May, on written demand, require an official report from the board of supervisors of their bonded and outstanding

indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county indebtedness upon the official demand of said authorities in the same manner as other territorial indebtedness and they shall issue bonds for any indebtedness now allowed or that may hereafter be allowed by law to said county upon official demand by said authorities."

If there had been no subsequent legislation it may be (a point not necessary to be decided in this case) that the commissioners could only act upon the report of the supervisors, though they could demand such report.

But there was subsequent legislation, to wit, the said Territorial Act of March 19, 1891. (Reprinted in Appendix, *post*, p. 85). This Act we proceed to consider in its application to the case at the bar.

The Territorial Act of March 19, 1891, expressly gives the holders of these Pima County bonds the right to have them refunded.

The Territorial Legislature (as expressly permitted by the above Act of Congress of June 25, 1890), passed an Act approved March 19th, 1891, entitled:

"An Act to provide for funding territorial, county and other indebtedness and supplemental to the Act of Congress entitled 'An Act approving with amendments the funding act of Arizona,' approved June 25th, 1890" (Laws of Arizona, 1891, p. 120).

The said Act provided:

"SECTION 1. That the Act of Congress entitled 'An Act Aproving with Amendments the Funding Act of Arizona,' approved June 25th, 1890, be, and the same is hereby, now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said Act of Congress, the loan commission-

ers of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said Act, and all bonds issued under the provisions of this Act and the interest thereon shall be payable in gold coin of the United States."

The said Act of March 19, 1891, also provided:

"SEC. 7. Any person holding bonds of any County existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this Act, at no less than their face or par value and the accrued interest at the time of the exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

This Act (reprinted at large in the Appendix hereto) gives the right to any holder of bonds to exchange them. As he has this right, it is the duty of the commissioners to make the exchange. They have no discretion. The right is absolute and the duty is commensurate therewith.

That this Act, by its terms (Sec. 7), gives the bondholder such right cannot be disputed. (*Post*, p. 88, Sec. 7). If the Act is valid, the judgment denying the mandamus is wrong. Why not valid?

Such legislation was not only generally authorized by the Organic Act, but specifically by the Act of June 25, 1890.

In 1886, in the Harrison Act, Congress validated these and other like bonds, or at least recognized their validity, and by the Act of June 25, 1890, amending the funding Act of Arizona, provided for the funding of bonds of this class and sent the Act as amended back to the Territory with power to enact further leg-

islation on the subject of funding such bonds, which power the Legislature of Arizona exercised in passing the supplemental and amendatory funding act of March 19, 1891. In this condition of legislation the Pima County Case came on for decision in this Court, and this Court, in 1894, without having fully before it the legislation of Congress and of the Territory above discussed, or the validating provisions of the Harrison Act, or the provisions of the Act of June 25, 1890, and the supplemental Act of the territorial legislature of March 19, 1891, as to the funding of such bonds, held that the Pima County bonds were invalid under the Act of June 8, 1878. This was the situation in 1896 when the attention of the Congress was called to the Pima County decision, and Congress then reaffirmed its will and purpose in the Act of June 6, 1896, by again validating these bonds and providing that they should be funded. How funded? Funded under and in accordance with the combined legislation of Congress and the Territory in and by the Act of June 25, 1890, and the territorial supplementary act of March 19, 1891. Therefore, the validating Act of June 6, 1896, is a provision that they shall be funded under the Act of June 25, 1890, as amended and supplemented with the consent of Congress by the Territorial Act of March 19, 1891. The Act of June 6, 1896, thus provides for the carrying out of the Act of March 19, 1891, which, as above shown, clearly provides that the bondholder who is willing to take a reduced rate of interest shall have the right to demand the funding bonds. Why not? Congress said in this act for the second time these bonds were valid. It thereby imposed an absolute obligation on the part of Pima County to pay them, and if they are not funded the

county must pay seven per cent. Again we ask, why not? Certain railroad aid bonds issued by counties in Arizona, to wit, the Maricopa County and part of the Yavapai County bonds, had already been refunded, and Congress ratified the funding. Why, therefore, should the Courts hesitate to construe the Territorial Act of March 19, 1891, and the Act of Congress of June 6, 1896, beneficially to the county by holding that they provide that if any bondholder is willing to take the reduced interest he may have the benefit of the funding provisions?

The said Territorial Act of March 19, 1891, was in force when Congress passed the said Act of June 6, 1896. Congress knew this fact, and that it must disapprove this in order to annul it, for, under the Revised Statutes (§ 1850) and the Organic Act of the Territory (9 Stat., 449, and 12 Stat., 665), "All laws passed by the legislative assembly shall be submitted to Congress, and, *if disapproved*, shall be null and of no effect."

The said Territorial Act of March 19, 1891, was, therefore, submitted to Congress, and *was never disapproved by it*. Said Act, therefore, stands in full force and effect under the general legislative power conferred by the Organic Act of the Territory, as well as by the specific power conferred by said Act of Congress of June 25, 1890, upon the Territory, to legislate in regard to this particular subject.

"Repeals by implication are not favored." *Per* Mr. Justice BREWER in *Lees v. United States*, 150 U. S. 476, 479. This principle is well settled.

The said act of Congress of June 6, 1896 (Brief, p. 30), also gives the holder of these Pima County bonds the right to have them funded.

The said act expressly provides (sec. 1) :

"All outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding Act approved June 25, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith with compliance with the terms of the acts of the legislature by which they were authorized, **shall** be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this Act."

Note the language of this act of Congress of June 6, 1896—"*shall* be funded." This language is clearly mandatory, and requires the Loan Commissioners to fund these Pima County bonds. These bonds were expressly validitated and hence the provisions for funding on a lower basis if the bondholder would consent.

This was an original suit brought in the Supreme Court of Arizona, praying for a writ of mandamus directing the Loan Commissioners of Arizona to fund the bonds of the County of Pima held by Appellants. The Code of Arizona provides that the writ may be issued by the Supreme Court :

" To compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station ; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled. This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy

in the ordinary course of law " (Rev. Stat., Arizona, Sec. 2335, Tit. Mandamus).

That mandamus is the proper remedy to compel the issue of bonds in a case where the statute provides for such issue, and gives to the relator a right to receive such bonds or even their proceeds, has been recently decided by the Court of Appeals of the State of New York, in *People ex rel. Dady vs. Supervisor*, 154 N. Y., 381, in which case the court, on the relation of a contractor, granted a mandamus directing the issue and sale of bonds as provided in the statute in order to furnish moneys to pay such contractor. Much more is mandamus the proper remedy in the present case, where the statutes expressly give to the relator the right to receive the bonds themselves.

The Act of Congress of August 3, 1894 (28 St., p. 224), printed in Appendix *(post*, p. 90*)*, extended the operation of said Act of Congress of June 25, 1890, to indebtedness down to December 31st, 1885, and said Act of Congress of June 6th, 1896 *(ante*, p. 30*)*, extends the Acts down to January 1st, 1897.

As the right has been given to the holder of the bonds to exchange them for funding bonds as aforesaid, if the loan commissioners refuse to do so on demand, the holder has no other remedy except to appeal to the Court to direct them to do their duty. This is what has been done in the present case.

Said Sec. 7 of the Territorial Act of March 19, 1891, quoted above, gives to the holder of bonds not due the absolute and unconditional right to fund if he wishes, provided he is willing to fund at par and to receive only 5 per cent. interest on the new bonds. Having this right he has made demand to have his holdings

funded on these terms, and he has been refused. He has been deprived of the use and enjoyment of a right and therefore is entitled to the remedy by the Code. He has no other adequate remedy.

The answer raises only one issue which is an issue of law as to the validity of the bonds. If the bonds are valid we have the right to the remedy.

The Supreme Court of the Territory has decided that the said Act of Congress of June 6, 1896, validated similar railroad aid bonds of Yavapai County, Arizona, issued under an Act of the Territorial Legislature, approved March 12, 1885.

> *Coconino County vs. Yavapai County*, 52 Pac. Rep., 1127. Text in full of said decision see *ante*, p. 33.

We submit therefore that the bonds are valid ; that by law the holders of the same have the right to have them funded by exchange of the present seven per cent. county bonds and matured coupons at par, for five per cent. Territorial funding bonds, provided for by the said Acts of Congress and the Territory.

The holders have offered their bonds and demanded the exchange. The defendants the loan Commissioners have refused to perform the duty imposed upon them by statute. The Court should require them to perform it.

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APPENDIX TO BRIEF.

I.

Re Harrison Act.

49TH CONGRESS, 1st Session. SENATE. REPORT No. 1327.

IN THE SENATE OF THE UNITED STATES.

JUNE 15, 1886.—Ordered to be printed.

MR. HARRISON, from the Committee on Territories, submitted the following

REPORT:

[To accompany bill H. R. 5179.]

The Committee on Territories, to whom was referred the bill (H. R. 5179) to prohibit the passage of local or special laws in the Territories of the United States, respectfully report:

This bill was intended to throw about the legislation of the general assemblies of the Territories one of the safeguards against improper legislation which is found in the constitutions of most of the States.

There is now general concurrence in the opinion that special legislation, in all cases were general laws can be made applicable, should be prohibited. Some of our Territories have now become so populous and worthy, so full of commercial and business enterprise, that the necessity of imposing such limitations upon the power of the Territorial assemblies as are found in the best constitutions of the States seem to be imperative in order to protect the people against unwise and hasty legislation.

Most of our State constitutions contain some limitation upon the power of municipalities to loan their credit and to create municipal debts. **The people**

of the Territories have no such protection against improvident subscriptions to the stock of corporations or the reckless creation of municipal debts. As a result several of our Territories have already incurred large Territorial debts, and many of the counties and towns have incurred an indebtedness much beyond the limits of prudence.

Desiring to obtain the most recent statistics upon this subject, the chairman of this committee addressed the governors of the several Territories, and in response received detailed information from each, which will be presented in an appendix to this report.

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The committee, in view of the condition of things in some of the Territories, disclosed by these reports of the governors, have thought it wise to report certain amendments to the House bill—

First, by making some changes in the list of subjects as to which special legislation is prohibited; and,

Second, by adding several sections restrictive of the power to create municipal and Territorial debts.

The first of the added sections prohibits any of the Territories or any political or municipal corporation or subdivision of any Territory from making any subscription to the capital stock of any incorporated company or associatian, and from loaning its credit to any such company.

The second limits the power of Territorial assemblies to create debts to the necessary purposes specified therein.

The third prohibits the counties and municipalities from creating any debt exceeding 2 per centum on the value of the taxable property as ascertained by the last assessment.

The fifth amends section 1889 of the Revised Statutes of the United States by extending the power of the Territorial assemblies so that they may authorize by general law the incorporation of insurance companies, banks of discount and deposit, loan, trust, and guaranty associations.

The committee are of the opinion that the passage of the bill as amended will give much greater security to property and in the end a safer development of the resources of the Territories. It is true that all Territorial legislation is now subject to be annulled or modified by act of Congress. But experience has shown

that it is very difficult to exercise this power wisely. It is fully reserved, however, in this bill.

We therefore recommend the passage of the bill with amendments.

APPENDIX TO REPORT.

ARIZONA.

OFFICE OF THE GOVERNOR,
Prescott, Ariz., December 22, 1885.

* * * * * *

County indebtedness to January 1, 1885.

County.	Nature of indebtedness.	Amounts	Totals.
Cochise	Bonded	$155,000	
	Outstanding warrants	40,000	
			$195,000
Pinal	Bonded	8,000	
	Outstanding warrants	12,400	
			20,400
Pima	Bonded	204,750	
	Outstanding warrants	127,725	
			332,475
Yavapai	Bonded	169,000	
	Outstanding warrants	35,000	
			204,000
Maricopa	Bonded		100,000
Mohave	Outstanding warrants and interest.		39,750
Graham	Outstanding warrants		25,000
Apache	Bonds	10,000	
	Outstanding warrants	50,000	
			60,000
Yuma	Outstanding warrants		110,000
Gila	Bonded		15,000
	Total		1,101,625

NEW MEXICO.

Under date of January 1, 1886, Governor Ross furnished the following statement:

Territorial or County.	Nature of indebtedness.	Amount.
Grant County	Railroad bonds	$57,000 00
	Municipal indebtedness (*railroad* bonds)	46,800 00
Santa Fé County	Railroad bonds	150,000 00

WASHINGTON TERRITORY.

EXECUTIVE OFFICE,
Olympia, January 25, 1886.

* * * * * *

The bonded indebtedness of Thurston County [$75,000] was *incurred in aid of railroad construction.*

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II.

Section 1889, Revised Statutes United States.

The legislative assemblies of the several Territories shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries or any benevolent, charitable or scientific association.

III.

An act explanatory of section 1889 of the Revised Statutes of the United States, and to ratify and confirm certain territorial legislation, and for other purposes (20 Stats., 101).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled : That the words ' the legislative assemblies of the several territories shall not grant private charters or especial privileges,' in section 1889 of the Revised Statutes of the United States, shall not be construed as prohibiting the legislative assemblies of the several territories of the United States from creating towns, cities or other municipal corporations, and providing for the government of the same, and conferring upon them the corporate power and privileges necessary to their local administration by either general or special acts ; and that all general and special acts of such legislative assemblies heretofore passed creating and providing for the government of towns, cities or other municipal corporations, and conferring such rights, powers and privileges upon the same as were necessary to their local administration, be, and the same are hereby, ratified and confirmed and declared to be valid, any law to the contrary notwithstanding ; *subject, however, to amendment or repeal hereafter by such legislative assembly.* But nothing herein shall have the effect to create any private right except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs.

Approved June 8, 1878.

IV.

Territorial Act of February 21, 1883.

An Act to promote the construction of a certain railroad.

[Laws Territory of Arizona, 1883, p. 61]

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1.—Upon information in writing to the Chairman of the Board of Supervisors of Pima County, Arizona Territory, by the President of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the Secretary of said Territory, on the 23rd day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said County of Pima, according to the provisions of this Act, it shall be the duty of said Chairman, and he is hereby directed to call a meeting of said Board, to be held within five days after the receipt of said notification, and it shall be the duty of said Board of Supervisors, and they are hereby directed to meet within five days, at the county seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said County, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semiannually, the principal payable in twenty years, which said bonds, and the interest coupons thereto attached shall be signed by said Chairman and the Clerk of said Board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the Clerk of said Board to the County Treasurer of said County of Pima, to be by him disposed of as hereinafter provided, and said County Treasurer shall receipt to the said Clerk for the said bonds.

SEC. 2. Upon the application of said railroad company to the said Treasurer, and the tender by said company of fifty thousand dollars of the first mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those

of said County, it shall be the duty of said Treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the President and Secretary of said railroad company, in exchange for fifty thousand dollars of the first mortgage bonds of said railroad company, so tendered as above provided. And whenever, and so often as five each miles of said railroad shall have been graded, laid with ties and iroh, said Treasurer shall upon proof thereof, which proof shall be the certificate of the County Surveyor to that effect, exchange with the said President and Secretary of said railroad company fifty thousand dollars of said bonds of said Pima County for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company.

SEC. 3. The said bonds herein provided to be issued by the said County of Pima shall be issued in the name of said county, and shall be made payable to bearer twenty years after date, and shall be made payable, both principal and interest, at the office of the County Treasurer of said county issuing the same. The said bonds and coupons, in addition to being signed by the Chairman and Clerk of the Board of Supervisors of said County, shall also be signed by the Recorder of said County, who shall affix to each bond the seal of his office.

SEC. 4. The said Board of Supervisors of Pima County, issuing bonds as aforesaid, are hereby authorized and directed, at their first regular meeting, after the issuance of the same and in each year thereafter, until the said bonds are paid, in case there should not be sufficient moneys in the railroad fund provided for, to pay the annual interest upon said bonds, to levy for each year a tax sufficient to meet any deficiency in said railroad fund to pay said interest, which tax, however, shall not be more than twenty cents upon each one hundred dollars of taxable property in the above-named county, which tax shall be levied and collected in the manner as is, or may hereafter be provided by law for the levying and collecting of other Territorial and County taxes in said county, and which tax shall be known as the railroad deficiency interest tax, and the proceeds of said tax, together with the interest received by said County on the bonds of said railroad

company, held by said county, shall constitute a fund to be applied only to the payment of the interest on and redemption of the bonds provided for in this Act to be issued by said county, and shall constitute the fund heretofore mentioned and be known as the Railroad Fund.

SEC. 5. The bonds of said railroad company, hereinbefore provided for to be tendered and exchanged for the bonds of Pima County shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal owned by said railroad company, at the time of the issuance of said bonds, or that may thereafter be acquired, including also, all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company, and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached, and shall be made payable, both principal and interest, at the office of said company in the City of Tucson, in the County of Pima. And said deed of trust or mortgage shall provide that no more bonds than to the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company.

SEC. 6. Whenever in the judgment of the Board of Supervisors of Pima County, it may be deemed advisable to sell any or all of the bonds of said railroad company, received in exchange by them, as aforesaid, they are hereby authorized and empowered to direct the Treasurer of said county to advertise in a newspaper published in said county for the space of four weeks, for sealed proposals for the purchase of any or all of said bonds of said railroad company; and ten days after the said notice shall have been published as aforesaid the Treasurer shall open the said proposals, and shall sell said bonds to the highest bidder therefor, in such lots as he may be directed by said Board of Supervisors, and the proceeds of such sale shall be placed in the said Railroad Fund to pay the interest and principal on the respective bonds of said county; *provided, however*, that the Treasurer may reject any and all bids; *and, provided further*, that no sale of such bonds shall be concluded until confirmed and approved by the Board of Supervisors by an order entered upon its minutes.

SEC. 7. Whenever, after the payment out of said Railroad Fund of the semi-annual interest on the said bonds, there shall be any money left in said Railroad Fund, it shall be the duty of the Treasurer of said County to advertise in a newspaper published in said County for the space of four weeks for sealed proposals to surrender any of the bonds of the said county, and ten days after such notice shall have been published, as aforesaid, the Treasurer shall open the said proposals and shall redeem the bonds of said county so far as the said fund on hand may be sufficient; *provided*, those offered to be surrendered at the lowest rates, shall be redeemed first; *and*, *provided*, *further*, that none shall be redeemed at a price exceeding the par value of said bonds.

SEC. 8. If, for any reason, the Board of Supervisors of the county herein named fails to meet at the times herein designated, it shall be the duty of said Board to meet on each succeeding Monday thereafter until the acts provided to be done by said Board under the provisions of this Act have been fully done and completed, and all the acts of said Board so done in the premises, subsequent to the times hereinbefore designated, shall be as valid as though done within the time hereinbefore prescribed.

SEC. 9. A copy of the articles of association certified by the Secretary of the Territory of Arizona, of the Arizona Narrow Gauge Railroad Company, and endorsed as filed by said Secretary on the 23d day of November, A. D. 1882, shall be sufficient proof to the Board of Supervisors of Pima County or officers herein named of the identification of said Arizona Narrow Gauge Railroad Company herein mentioned. The route of said road shall in all respects, so far as practicable, conform substantially to the route as set forth in the articles of incorporation of said company now on file in the office of the Secretary of this Territory.

SEC. 10. This Act shall take effect and be in force from and after its passage.

Approved February 21, 1883.

V.

List of other Statutes enacted by the several Territorial Legislatures authorizing the issue of Railroad Aid Bonds by Counties and other Municipal Corporations.

Arizona.

1. "An act to aid in the construction and maintenance of a certain railroad," approved February 13, 1879. Laws, 1879, p. 42. Provides that the Board of Supervisors of Maricopa County shall issue county bonds to the amount of $150,000, and the Board of Supervisors of Yavapai County shall issue county bonds to the amount of $250,000, to any association of persons duly incorporated under the laws of the Territory of Arizona to construct a railroad from the line of the Southern Pacific Company at Maricopa Wells to the Town of Phœnix; and thence to the Village of Prescott. Act does not apply to Pinal County. Repealed by Act Feb. 23, 1881, Laws 1881, p. 80.

2. "An act to aid in the construction of a certain railway," approved March 1, 1881. Laws 1881, p. 118. Applied to Yavapai County. Prescott and Thirty-fifth Parallel Railroad Company. Exempts property from local and county taxation. No county bonds authorized by this Act. Repealed by Laws 1883, p. 150, being Act No. 4 *infra*.

3. "An act to aid in the construction and maintenance of a certain railroad," approved March 8, 1883. Laws 1883, p. 244. Authorizes seven per cent. twenty-year bonds of Maricopa County in the sum of $60,000 to be exchanged for $60,000 bonds of such company as shall construct railroad from Phœnix to Maricopa Station on the line of the Southern Pacific Company.

4. "An act to encourage the construction of the Prescott and Thirty-fifth Parallel Railroad," approved March 6, 1883. Laws 1883, p. 150. Provides that the Prescott and Thirty-fifth Parallel Railroad Company shall receive $200,000 Yavapai County negotiable coupon twenty-year seven per cent. bonds. Repeals "An act to encourage the construction of a certain

railway," approved March 1, 1881. The county bonds, payable to said railroad company or bearer, are to be exchanged for an equal amount of paid-up unassessable capital stock.

5. "An act to aid in the construction of a certain railroad in Maricopa County," approved March 12, 1885. Laws 1885, p. 259. Provides for the issue to any person, corporation or association who shall construct the Phœnix and Wickenburg Railroad of negotiable seven per cent. thirty-year coupon bonds at the rate of $1,500 per mile of narrow guage and $3,000 per mile of standard guage railroad.

6. "An act to aid in the construction of a railroad in Yavapai County," approved March 12, 1885, Laws 1885, p. 193. Provides for the issue of Yavapai County bonds to any person, corporation or association who shall construct a railroad from Chino to Prescott, &c.

7. "An act to aid in the construction of a certain railroad between the City of Phœnix and the Southern Pacific Railroad," approved March 4, 1885, Laws 1885, p. 66. Provides that the Board of Supervisors of Maricopa County shall issue, pay and deliver to the Maricopa and Phœnix Railroad Company $200,000 Thirty-year seven per cent. gold coupon bonds.

8. "An act supplemental to an act entitled 'An act to aid in the construction of a certain railroad between the City of Phœnix and the Southern Pacific Railroad,' approved March 4, 1885," approved March 12, 1885; Laws 1885, p. 184. Provides that, if the Board of Supervisors of Maricopa County fail to comply with provisions of act of March 4, then Board of Railroad Commissioners thereby appointed shall carry out its provisions.

9. "An act to aid in the construction of certain railroads in the County of Gila," approved March 12, 1885, Laws 1885, p. 206. Provides that Gila County shall issue $150,000 negotiable seven per cent. coupon bonds to any person, corporation or association who shall construct a railroad from Flagstaff, in Yavapai County, to Globe, in Gila County.

Dakota.

1. "An act to fund the bonds and coupons isued by the County of Yankton under and by virtue of an act of the Legislative Assembly of the Territory of Dakota, entitled 'An act to enable organized counties and town-

ships to vote aid to any railroad and to provide for the payment of the same [approved April 21, 1871], and an Act of Congress, entitled 'An act in relation to the Dakota Southern Railroad Company,' and for other purposes" [approved May 27, 1872]. Became a law without the approval of the Governor. Laws Dakota Territory, 1881, p. 305.

2. "An act to legalize the acts of the president and trustees of the village of Dell Rapids, to increase their powers, and to authorize the issue of village bonds for railroad purposes, and to provide means of protection against loss by fire." Became a law without the approval of the Governor. Laws Dakota Territory, 1881, p. 309. Legalizes $12,500 village bonds issued to the Southern Minnesota Railway Extension Company. Authorizes $2,500 village bonds to defray expense incurred by said village for procuring the right of way for Southern Minnesota Railroad.

Montana.

1. "An act to authorize the counties interested to assist in building a railroad from the head of navigation on the Missouri River, at or near Fort Benton, to the City of Helena," approved February 11, 1876.

2. "An act to facilitate the construction of the Helena and Benton Railroad," approved February 16, 1877.

New Mexico.

1. "An act to aid in the construction of railroads," approved February 1, 1872 (Laws 1872, p. 44). Provides that any county may issue its railroad aid bonds not to exceed five per centum of assessed value of real and personal property.

This act was incorporated in full in Complied Laws New Mexico, 1884, as Title XXXIX., Railroads, §§ 2709 *et seq.*

2. "An act for the financial relief of counties and municipalities," approved February 26, 1891 (Laws 1891, p. 146).

Authorizes every county and municipality to refund its matured indebtedness.

Under said act, No. 1, we understand were issued the Santa Fe County and the Grant County, New

Mexico, railroad aid bonds, which are mentioned in the report of the Senate Committee at the time the Harrison Act was passed. See Extracts from Report, this Appendix, *supra*. See, also, Act of Congress of January 16, 1897, 29 Stat., 487, validating said railroad aid bonds and funding bonds issued therefor under said Act No. 2, and authorizing further refunding.

Washington.

The Thurston County, Washington Territory, Railroad Aid bonds mentioned in the report of the Senate Committee at the time of the Harrison Act (See this Appendix, *supra*) seem to have been authorized directly by Act of Congress (See Act of Congress, approved May 27, 1874; 18 Stat., 48).

Wyoming.

1. "An act to authorize the Board of County Commissioners of Laramie County to issue the bonds of said county to the Wyoming, Montana and Pacific Railroad Company," approved December 12, 1879; Laws 1879, p. 24. Repeals "An act to authorize the Board of County Commissioners of Laramie County to issue the bonds of said county to the said Colorado Central Railroad Company and for other purposes," approved December 14, 1877, in case said bonds are issued to said first-named company.

2. "An act to amend an act, entitled 'An act to authorize the Board of County Commissioners of Laramie County to issue the bonds of said county to the Wyoming, Montana and Pacific Railroad Company," approved Feb. 28, 1882 (Laws 1882, p. 25). Amends foregoing act by inserting the proviso that said company shall expend $20,000 by January 1, 1883, for machine shops, and shall complete one hundred miles of said railroad by November 1, 1883. In case said railroad company fail, then County Commissioners may issue $300,000 similar bonds to any other such railroad company.

3. "An act to authorize counties in the Territory of Wyoming to issue bonds for the purpose of aiding the construction of railways," approved February 27, 1886 (Laws 1886, p. 64).

VI.

Harrison Act of Congress, approved July 30, 1886.

An act to prohibit the passage of local or special laws in the Territories of the United States, to limit Territorial indebtedness, and for other purposes (24 Stat., 170).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

Changing the names of persons or places.

Laying out, opening, altering, and working roads or highways.

Vacating roads, town-plats, streets, alleys and public grounds.

Locating or changing county seats.

Regulating county and township affairs.

Regulating the practice in courts of justice.

Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables.

Providing for changes of venue in civil and criminal cases.

Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village.

For the punishment of crimes or misdemeanors.

For the assessment and collection of taxes for Territorial, county, township or road purposes.

Summoning and impaneling grand or petit jurors.

Providing for the management of common schools.

Regulating the rate of interest on money.

The opening and conducting of any election or designating the place of voting.

The sale or mortgage of real estate belonging to minors or others under disability.

The protection of game or fish.

Chartering or licensing ferries or toll bridges.

Remitting fines, penalties or forfeitures.

Creating, increasing or decreasing fees, percentage or allowances of public officers during the term for which said officers are elected or appointed.

Changing the law of descent.

Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose.

Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof.

SEC. 2. That no Territory of the United States now or hereafter to be organized, or any political or municipal corporation or subdivision of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association.

SEC. 3. That no law of any Territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the Territorial debt, to suppress insurrections, or to provide for the public defense, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such Territory, if the total indebtedness of the Territory is not thereby made to exceed one per centum upon the assessed value of the taxable property in such Territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county or other subdivision therein.

SEC. 4. That no political or municipal corporation, county, or other subdivision in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within

such corporation, county, or subdivision, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: **That nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any territory as to any bonds heretofore issued or contracted to be issued.**

SEC. 5. That section eighteen hundred and eighty-nine, title twenty-three, of the Revised Statutes of the United States, be amended to read as follows:

"The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue), loan, trust and guarantee associations, and for the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvements of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable or scientific association."

SEC. 6. That nothing in this act contained shall be construed to abridge the power of Congress to annul any law passed by a Territorial Legislature, or to modify any existing law of Congress requiring in any case that the laws of any Territory shall be submitted to Congress.

SEC. 7. That all acts and parts of acts hereafter passed by any Territorial Legislature in conflict with the provisions of this act shall be null and void.

Approved July 30, 1886.

VII.

Territorial Funding Act enacted by the Legislative Assembly of the Territory of Arizona, approved March 10, 1887.

[Revised Statutes of Arizona, 1887, p. 361.]

TITLE XXXI.

FUNDING.

CHAPTER ONE.

Territorial Indebtedness.

[Approved March 10, 1887.]

2039 (SEC. 1.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona, the governor of the said Territory, together with the Territorial auditor and Territorial secretary and their successors in office shall constitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

2040 (SEC. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing Territorial indebtedness due, and to become due, and for the purpose of paying, redeeming and refunding all or any part of the principal and interest, or either of the existing and subsisting Territorial legal indebtedness, and also that which may at any time become due, the said commissioners shall, from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

2041 (SEC. 3.) Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be

fixed by said loan commissioners, but in no case to exceed six and one-half (6½) per cent. per annum, which interest shall be paid in gold coin, or its equivalent in lawful money of the United States, on the fifteenth day of January in each year, at the office of the Territorial treasurer, or at such bank in the city of New York, in the State of New York, or in the city of San Francisco, in the State of California, as may be designated by said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States within twenty-five years after the date of their issue.

They shall bear the date of their issue, state when, where and to whom payable, rate of interest and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the Territorial treasurer, and bear his official seal, and shall be registered by the Territorial auditor in a book to be kept by him for that purpose, and the faith and credit of the Territory is hereby pledged for the payment of said bonds and the interest accruing thereon as herein provided.

2042 (SEC. 4.) Coupons for the interest shall be attached to each bond, so that they may be removed without injury or mutilation to bond.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the Territorial treasurer.

The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall said bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser as hereinafter provided.

2043 (SEC. 5.) Whenever the said loan commissioners shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the Territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and at least one insertion in a newspaper published in the city of New York, in the State of New York, and in the city of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the rate

of interest they shall bear, the place, day and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the hignest bidder or bidders therefor: *Provided*, That said loan commissioners shall have the right to reject any and all bids: *And Provided Further*, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

2044 (SEC. 6.) When a sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of the general fund of said Territory, upon the order of the Territorial auditor, and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

They shall from time to time, after signing said bonds, deliver them to the Territorial treasurer, taking his receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds issued under this act, delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

2045 (SEC. 7.) The Territorial treasurer shall sell said bonds for cash or exchange them for any of the Territorial indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any Territorial indebtedness be redeemed at more than its face value and any interest that may be due thereon.

The said treasurer shall indorse, by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

2046 (SEC. 8.) All moneys received by said treasurer from a sale of such bonds shall be applied by him exclusively to the redemption of the Territorial indebtedness for the redemption of which such bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of Territorial warrants of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

2047 (SEC. 9.) There shall be levied annually upon the taxable property in this Territory, and in addition to the levy for other authorized taxes a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this Act to be placed by the Territorial treasurer in a fund to be known as the "Interest Fund." And ten years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged.

The Territorial board of equalization, if there be one, if not, then the Territorial auditor, shall determine the rate of tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the "board of supervisors" in each county; and the said board of supervisors are hereby directed and required to enter such rate on the assessment roll of their respective counties, in the same manner and with the same effect as is provided by law in relation to other Territorial and county taxes. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

All moneys derived from taxes authorized by the provisions of this act shall be paid into the Territorial treasury and shall be applied—

First. To the payment of the interest on the bonds issued hereunder.

Second. To the payment of the principal of such bonds: *Provided*, That all moneys remaining in the

"interest fund" after the payment of the interest in each year, for the first ten years after the issuance of any bonds under this act, and all moneys remaining in the "redemption fund" after all said bonds shall have been paid and discharged shall be transferred by the Territorial treasurer to the Territorial general fund.

2048 (SEC. 10.) Whenever, after the expiration of the ten years from the date of issuance of any bonds under this act there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the Territorial treasurer to advertise as in manner of the advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and concellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the Territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The Territorial auditor shall keep a record of all bonds issued and disposed of by the Territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and, if exchanged, for what, and when presented for redemption, the date, amount due thereon, and person surrendering.

2049 (SEC. 11.) When the treasurer pays or redeems any Territorial indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and canceled," with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under this act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in

this act shall at all times be open to the inspection of the party interested, or the governor, or a committee of either branch of the legislature, or a joint committee of both.

2050 (SEC. 12.) It shall be the duty of the Territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: *Provided*, That the Territorial auditor shall first draw his warrant on the Territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund, which said interest warrant shall be drawn at least one month previous to the maturing of the interest.

2051 (SEC. 13.) It shall be the duty of said board of loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial legislative assembly.

2052 (SEC. 14.) No bond issued under the provisions of this act shall be taxed within this Territory.

[Took effect immediately.]

NOTE.—There was also an Act of the Territory of Arizona, approved March 2, 1887, being "Chapter Two" of said "Title XXXI.—Funding," which said act provided for the funding or refunding of county indebtedness by the board of supervisors of the county, and the issuing of county bonds for that purpose. The scheme of the said Chapter Two of funding county indebtedness by the issue of county bonds was superseded by the Act of Congress of June 25, 1890 (which is the next Act printed in this Appendix), providing for the funding of county bonds by the issue, not of county bonds, but of Territorial bonds, under and in accordance with the provisions of the said Act of Congress of June 25, 1890, amending said "Title XXXI.—

Funding," and providing that, as amended, the same " is hereby approved and confirmed, subject to future Territorial legislation," which future Territorial legislation is embodied in the Funding Act of the Territory of Arizona, approved March 19, 1891, printed in this Appendix, *post*, p. 85.

VIII.

Act of Congress approved June 25, 1890.

An Act approving, with amendments, the funding act of Arizona (26 Stat. 175).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That the act of the Revised Statutes of Arizona of eighteen hundred and eighty-seven, known as " Title XXXI., Funding," be, and is hereby amended so as to read as follows, and that as amended the same is hereby approved and confirmed, subject to future Territorial legislation:

" TITLE XXXI.—FUNDING AND LOAN.

" Chapter One.

" TERRITORIAL, COUNTY, MUNICIPAL AND SCHOOL DISTRICT INDEBTEDNESS.

" Par. 2039 (Sec. I.) For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the Territory of Arizona and such future indebtedness as may be or is now authorized by law, the governor of the said Territory, together with the Territorial auditor and Territorial secretary and their successors in office, shall constitute a board of commissioners, to be styled the loan commissioners of the Territory of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

"Par. 2040 (Sec. 2.) It shall be, and is hereby, declared the duty of the loan commissioners to provide for the payment of the existing Territorial indebtedness due, and to become due, or that is now, or may be hereafter, authorized by law and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest, or either of the existing and subsisting Territorial legal indebtedness, and also that which may at any time become due or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this Territory, when the same can be done at a lower rate of interest and to the profit and benefit of the Territory.

"Par. 2041 (Sec. 3). Said bonds shall be issued as near as practicable in denominations of one thousand dollars, but bonds of a lower denomination, not less than two hundred and fifty dollars, may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners, but in no case to exceed five per centum per annum, which interest shall be paid in gold coin, or its equivalent in lawful money of the United States, on the fifteenth day of January in each year, at the office of the Territorial treasurer, or at such bank in the city of New York, in the State of New York, or in the city of San Francisco, in the State of California, or such place as may be designated by the said loan commissioners, at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States fifty years after the date of their issue. Said Territory reserves the right to redeem at par any of said bonds, in their numerical order, at any time after twenty years after the date thereof.

"They shall bear the date of their issue, state when, where, and to whom payable, rate of interest, and when and where payable, and shall be signed by said loan commissioners, and shall have the seal of the Territory affixed thereto, and countersigned by the Territorial treasurer, and bear his official seal, and shall be registered by the Territorial auditor in a book to be kept by him for the purpose, which shall state amount sold for, or, if exchanged, for what; and the faith and credit of the Territory is hereby pledged for the payment of said bonds and the interest accruing thereon, as herein provided.

"Par. 2042 (Sec. 4). Coupons for the interest shall be attached to each bond, so that they may be removed without injury to or mutilation of bond.

"They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the Territorial treasurer.

"The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall any interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

"Par. 2043 (Sec. 5). Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this Territory, they shall direct the Territorial treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published for the period of one month in some daily newspaper published at the capital of the Territory, and at least one insertion in a newspaper published in the city of New York, in the State of New York, and in the city of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the place, day and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice, the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof to the bidder or bidders therefor bidding the lowest rate of interest: *Provided*, That said loan commissioners shall have the right to reject any and all bids: *And Provided Further*, That they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

"Par. 2044. (Sec. 6.) When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds as in this act provided, and any expense incurred by them therefor, for the publication of said notices, costs of remitting funds for the payment of interest or money on said bonds, and all other necessary incidental expenses under the provisions of this act, shall be paid out of

the general fund of said Territory, upon the order of the Territorial auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

"They shall from time to time, after signing said bonds, deliver them to the Territorial treasurer, taking his receipt therefor, and charge him therewith. The said treasurer shall give to the Territory of Arizona an additional official bond, with two or more sureties, in a sum equal to the amount of bonds delivered to him by the said loan commissioners, which bond shall be approved by the governor and deposited and filed with the secretary of the Territory and recorded by him in a book to be kept for that purpose. And the said treasurer shall stand charged upon his official bond for the faithful performance of the duties required of him under this act.

"Par. 2045 (Sec. 7). The Territorial treasurer shall sell said bonds for cash or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

"That said treasurer shall endorse, by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

"Par. 2046 (Sec. 8). Moneys received by said treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of Territorial warrants of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Before any such indebtedness shall be paid the Territorial auditor shall indorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

"Par. 2047 (Sec. 9). There shall be levied annually upon the taxable property in this Territory, and in

addition to the levy for other authorized taxes a sufficient sum to pay the interest on all bonds issued and disposed of in pursuance of the provisions of this Act to be placed in the Territorial treasury in the fund to be known as the 'Interest Fund.' And fifty years after such bonds shall have been issued such additional amount shall be levied annually as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid and discharged; nothing herein contained shall be construed to prevent the legislature of Arizona from creating a sinking fund during the life of said bonds for their redemption at maturity.

"The Territorial board of equalization, or, on their failure, the Territorial auditor, shall determine the rate of tax to be levied in the different counties in the Territory to carry out the provisions of this act, and shall certify the same to the 'board of supervisors' in each county and to the municipal or school authorities; and the said board of supervisors or authorities are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other Territorial, county, municipal and school taxes. Every tax levied under the provisions of authority of this act is hereby made a lien against the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such tax has been paid.

"All moneys derived from taxes authorized by provisions of this act shall be paid into the Territorial treasury and shall be applied—

"FIRST. To the payment of the interest on the bonds issued hereunder.

"SECOND. To the payment of the principal of such bonds: *Provided*, That all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the 'redemption fund' after all said bonds shall have been paid and discharged shall be transferred by the Territorial treasurer to the Territorial 'general fund.'

"Par. 2048 (Sec. 10). Whenever, after the expiration of the fifty years from the date of issuance of any bonds under this act there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the Territorial treasurer to advertise as

in the manner of advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of money in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which such fund is set apart to pay and discharge; and if such bonds so numbered in such advertisement shall not be presented for payment and cancellation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the Territorial auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The Territorial auditor shall keep a record of all bonds issued and disposed of by the Territorial treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for redemption, the date, amount due thereon, and person surrendering.

"The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other Territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law to said county, municipality or school district, upon official demand by said authorities; the county, municipality or school district to pay into the Territorial treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the Territorial board of equalization, or on their failure by the Territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding or other bonds issued to such

county, municipality or school district when the same shall become due and in addition a rate of interest paid by the Territory on such bonds.

"Par. 2049 (Sec. 11). When the treasurer pays or redeems any indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words 'redeemed and canceled,' with the date of cancellation. He shall keep a full and particular account and record of all his proceedings under the act and of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings under this act with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the matter provided in this act shall at all times be open to the inspection of the party interested, or to the governor, or a committee of either branch of the legislature, or a joint committee of both.

"Par. 2050 (Sec. 12). It shall be the duty of the Territorial treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund: *Provided*, That the Territorial auditor shall first draw his warrant on the Territorial treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

"Par. 2051 (Sec. 13). It shall be the duty of said loan commissioners to make a full report of all their proceedings had under the provisions of this act to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the Territorial legislative assembly.

"Par. 2052 (Sec. 14). No bond issued under the provisions of this act shall be taxed within this Territory.

Sec. 15. That nothing in this act shall be construed to authorize any future increase of any indebtedness in excess of the limit prescribed by the 'Harrison act': *Provided, however*, That the present existing and outstanding indebtedness, together with such warrants as may be issued for the necessary and current expenses of carrying on Territorial, county, municipal and school government for the year ending December thirty-first, eighteen hundred and ninety, may also be funded and bonds issued for the redemp-

tion thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison act.'

That all acts or parts of acts in conflict with this act are hereby repealed.

Approved June 25, 1890.

IX.

Territorial Funding Act of Arizona, Approved March 19, 1891.

An Act to provide for funding Territorial, County and other indebtedness and being supplemental to the Act of Congress entitled "An Act Approving with Amendments the Funding Act of Arizona," approved June 25, 1890.

[Laws Territory of Arizona, 1891, p. 120].

Be it enacted by the Legislative Assembly of the Territory of Arizona.

SECTION 1. That the Act of Congress entitled "An Act Approving with Amendments the Funding Act of Arizona," approved June 25th, 1890, be, and the same is hereby, now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said Act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said Act, and all bonds issued under the provisions of this Act and the interest thereon shall be payable in gold coin of the United States.

SEC. 2. Whenever the said loan commissioners shall redeem, refund or pay any indebtedness of a county,

municipality or school district, or issue bonds to such county, municipality or school district as authorized by said act of Congress, the Territorial Treasurer shall open and keep an account with said county, municipality or school district, and shall at once make out and transmit to the proper officer or officers charged with the administration of the affairs of said county, municipality or school district, a statement under his official seal, showing the amount and character of the indebtedness of said county, municipality or school district, refunded or paid the amount of bonds issued therefor, when due and payable, rate of interest and amount of interest that will be required to be paid annually thereon. And said officer or officers shall file said statement in the proper office as a record therein.

SEC. 3. In all cases of funding and paying the indebtedness of any county or school district in such county, the Board of Supervisors of such county, or, of funding and paying the indebtedness of any municipality, the Executive or other proper officer or officers of such municipality, shall annually, at the time of assessing and levying taxes therein, cause to be assessed and levied each year upon the taxable property of the county in case of county indebtedness, municipality in case of municipal indebtedness, and school district in case of school district indebtedness, and in addition to other authorized taxes, a sufficient sum to pay the interest on the bonds issued and disposed of under the provisions of this Act, for the benefit of such county, municipality or school district respectively. And fifty (50) years after such bonds shall have been issued, such additional amount shall be levied, annually, as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this Act are paid. And all taxes shall be assessed, levied and collected as other county, municipal and school district taxes are collected, and shall be paid into the Territorial Treasury.

SEC. 4. If sufficient money shall not be realized each year from the collection of taxes to pay the interest on said bonds when due, the deficiency shall be paid out of the money, fund or funds, used for defraying the general expenses of such county, municipality or school district, for the funding, redemption and payment of whose indebtedness said bonds were issued, which said deficiency shall be paid

by the proper officer or officers in charge of said money, fund or funds, upon the official demand thereof by the Territorial Treasurer. All money collected in any county, municipality or school district, for the payment of said interest remaining after such payment, shall be paid into said fund or funds used for the general expenses of such county, municipality or school district.

SEC. 5. It shall be the duty of the respective county, municipality and school district officers, whose duty it is to levy and collect the taxes therein, to levy and collect the tax in this Act provided for the payment of the principal and interest of said bonds when due and payable and to pay the same into the Territorial Treasury at the time and times of the payment of the Territorial taxes. Any failure to comply with the conditions and provisions of this Act by any officer or officers charged with the performance thereof, or any neglect or refusal by him or them to levy, collect or pay over such taxes as aforesaid, or to apply the money collected under this Act otherwise than for the purpose for which it was collected, shall be deemed a misdemeanor, and upon conviction in a court having jurisdiction thereof, the person so convicted shall be fined in an amount equal to the sum that should have been levied and collected, or for any misappropriation of the moneys so collected, in an equal amount to the sum not applied as in this Act provided, and imprisoned as in other cases of misdemeanor, in the discretion of the court. And if the said proper officer or officers shall fail to levy the taxes as in this Act provided, he or they may be compelled to perform such duty by any court having jurisdiction thereof. Provided, that in such case of failure, the Territorial Board of Equalization, or, upon their failure to act, the Territorial Auditor shall levy sufficient taxes in the different counties, municipalities and school districts to carry out the provisions of this Act and the Act of which this is supplemental. Said Board and Auditor, or either of them, may require the proper officer or officers of the county, municipality or school district whose indebtedness has been refunded, and it shall be their duty to furnish said Board or Auditor such information as will enable said Board or Auditor to carry out the provisions of this Act and said Act of Congress. When the tax is so levied by the Territorial

Board of Equalization or Territorial Auditor, he or they shall transmit to the Board of Supervisors, in the case of the county and school district tax, and to the proper officers in case of municipal tax, or to such other officer or officers exercising like duties, a statement of the rate of taxes fixed and levied upon the property within said county, municipality or school district, for the purpose aforesaid, and the proper county, municipal and school district officers shall enter upon the tax roll and proceed to collect the tax levied, as other county, municipal and school district taxes are collected.

SEC. 6. The Board of Supervisors of each county shall fix and define the boundaries of each school district within the county, and all taxable property and the increase thereof, within the limits of each county, municipality or school district, is hereby pledged to the payment of any and all bonds and the interest thereon issued for the benefit of such county, municipality or school district respectively. And in the event of the division, disincorporation or dissolution in any manner of any such county, municipality or school district, the Board of Supervisors of each county, or other board of officers exercising the like duties, and in case of their failure to act, then the Territorial Board of Equalization, and upon their failure to act the Territorial Auditor or other officer exercising the like duties, shall cause the proper taxes to be assessed and levied upon the taxable property within the limits of such county, municipality or school district, at and from the time of the issuance of the bonds for its benefit, to meet the payment of such bonds and the interest thereon.

SEC. 7. **Any person holding bonds, warrants or other evidence of indebtedness of the Territory or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this Act at not less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon.**

SEC. 8. The provisions of said Act of Congress relating or applying to the liquidation, refunding and re-

deeming of the Territorial indebtedness, sale or exchange of bonds, receiving and applying the proceeds; shall apply and be the method used for the liquidation, refunding and redeeming the payment of the indebtedness of the counties, municipalities and school districts of this Territory authorized and contemplated by said Act. And the loan commissioners shall, at no time, issue to any county, municipality or school districts any bonds created under this Act or said Act of Congress, without requiring from the officer or officers receiving the same, a bond, as is required of the Territorial Treasurer, by section 6 of said Act of Congress; and the said officer or officers shall give such bond, and no bonds shall be issued to any county, municipality or school district except in exchange for the bonds, warrants or other evidences of indebtedness for the redemption of which the refunding bonds were issued.

SEC. 9. Each county, municipality and school district shall pay into the Territorial Treasury its *pro rata* of the costs and expenses incurred and paid by the Territory for the refunding, redeeming and payment of the indebtedness of said county, municipality or school district.

SEC. 10. This Act shall take effect and be in force from and after its passage.

Approved March 19, 1891.

X.

An act to amend an act entitled "An act approving with amendments the funding act of Arizona," approved June twenty-fifth, eighteen hundred and ninety.

[27 Stat., 87.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section three of said act be, and is so amended that the interest upon the bonds provided for in said act shall be payable semi-annually, on the

fifteenth days of January and July in each year, and that no further Territorial legislation shall be necessary to make said Territory liable for the principal and interest of said bonds; and no further advertisement for the sale of one million five hundred thousand dollars of said bonds, at not less than par, shall be necessary.

Approved July 13, 1892.

XI.

An Act to amend section fifteen of an Act approving, with amendments, the funding Act of Arizona approved June twenty-fifth, eighteen hundred and ninety.

[28 Stat., 224.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act approving, with amendmends, the funding Act of Arizona," approved June twenty-fifth, eighteen hundred and ninety, and paragraph twenty hundred and fifty-two (section fifteen), of said Act, be, and the same is hereby, amended by adding thereto as follows:

"*Provided further, however*, That the present outstanding warrants, certificates, and other evidences of indebtedness issued subsequent to December thirty-first, eighteen hundred and ninety, for the necessary and current expenses of carrying on the Territorial government only, together with such warrants as may be issued for such purpose for the years ending December thirty-first, eighteen hundred and ninety-four, and December thirty-first, eighteen hundred and ninety-five, may also be funded and bonds issued for the redemption thereof; and thereafter no warrants, certificates or other evidences of indebtedness shall be allowed to issue or be legal where the same is in excess of the limit prescribed by the 'Harrison Act.'"

SEC. 2. That all Acts or parts of Acts in conflict with this Act are hereby repealed.

Approved August 3, 1894.

XII.

Act of Congress approved June 6, 1896.

[29 Stat., 262.]

The Act of Congress approved June 6, 1896, validating the bonds in question and authorizing them to be refunded is printed at large in the body of the brief, page 30.

SUPREME COURT U. S.
FILED
JAN 23 1899
JAMES H. McKENNEY,
Clerk.

No. 94.

Brief of Dillon for Appt. Com

Supreme Court of the United States.

OCTOBER TERM, 1898, No. 94.

Filed Jan. 23, 1899.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

vs.

B. J. FRANKLIN, Governor, C. P. LEITCH, Auditor, and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

Motion to enter judgment nunc pro tunc.

Now comes the attorney for appellants in the above-entitled cause, and moves this Court for the entry of the judgment herein *nunc pro tunc;* and states the facts in this behalf to be as follows:

This cause was argued and submitted to this Court on or about December 12, 1898, briefs of counsel for both parties having been theretofore filed in due course. This Court thereupon considered the case on its merits and after deliberation this Court, on or about January 3, 1899, rendered its decision reversing the judgment of the Supreme Court of the Territory of Arizona, which was in favor of the defendants below, stating, directing and ordering in its opinion as follows:

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that the order of the Su-

preme Court of the Territory must be *reversed*, and the case remanded to that Court for further proceedings not inconsistent with the opinion of this Court."

Citation was served in this case March 16, 1897, and the record filed in this Court April 8, 1897 (Record, p. 14).

The attorney for the appellants further states that Elizabeth B. Voorhies, one of the appellants, has died pending the appeal to this Court, to wit, on November 18, 1897, in proof whereof he submits the affidavit of Francis W. Coler, a copy of which is annexed, and the original whereof is filed herewith.

Wherefore, the attorney for the appellants prays this Court to enter its judgment of reversal herein as of a date prior to the said 18th day of November, 1897, the date of the death of the said Elizabeth B. Voorhies, and that the said judgment of reversal and the mandate of the court herein to the court below shall authorize and direct the Supreme Court of the Territory of Arizona to enter its judgment granting the mandamus sought by the appellants as of the term at which the said action was tried in the Supreme Court of the Territory of Arizona, or of some suitable date prior to the said 18th day of November, 1897, to be determined and fixed upon by this court.

JOHN F. DILLON,
Attorney for Appellants.

Argument.

Where a party dies after the commencement of the term, and while the cause is under consideration by the Court, it is the practice of this Court and other Courts, including the Court of Chancery in England, as a matter of course, to order the judgment or decree to be entered *nunc pro tunc* as of the first day of the term or of a date prior to the death of the party.

Clay vs. Smith, 3 Pet., 411.
Bank of United States vs. Weisiger, 2 Pet., 351, note. The defendant having died

during the term, the Court ordered the decree to be entered as of a day before his decease (p. 481).

Griswold vs. Hill, 1 Paine, 483.
Campbell vs. Mesier, 4 John. Ch., 334, 342.
Davies vs. Davies, 9 Vesey, 461.

A similar motion in all respects was made and granted in the case of *Redfield vs. Parks*, 132 U. S., 239, 252, said motion, however (like this one), having been made and granted after the decision of the case on the merits, is not there reported.

DANIELL states the practice as follows (2 DANIELL'S *Chancery Pleadings and Practice*, *1017):

"An order to enter a decree or order *nunc pro tunc* may be obtained upon application *by motion, of course*, or by petition, of course, at the Rolls, and when passed must be left with the entering clerk at the Registrar's office as his authority to enter the decree or order."

This Court also in similar cases directs the lower Court to enter its judgment or decree *nunc pro tunc*.

Clay vs. Smith, 3 Pet., 411.
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Copy of Affidavit Referred to in the Foregoing Motion.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898, No. 94.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

AGAINST

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

Affidavit.

STATE OF NEW YORK, }
County of New York, } ss.:

I, FRANCIS W. COLER, being duly sworn, do state that I knew Elizabeth B. Voorhies, one of the appellants in the above-entitled case, in her lifetime; that the said Elizabeth B. Voorhies died on November 18, 1897; that she left a last will and testament, and that the executors of her will are George Albright, Wesley Albright and W. H. Maginnis. Further deponent saith not.

FRANCIS W. COLER.

Subscribed and sworn to before me this 19th day of January, 1899.

E. P. BICKNELL,
Notary Public,
N. Y. County.

[NOTARIAL SEAL.]

C. G. Burgoyne's Printing Business, 143-150 Centre St., N. Y.

No. 94.

Brf. of Dillon for Appls. (on mo.)

Office Supreme Court U. S.
FILED
APR 13 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1898, No. 94.

Filed April 13, 1899.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

vs.

B. J. FRANKLIN, Governor, C. P. LEITCH, Auditor, and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

Motion to enter judgment nunc pro tunc.

Now comes the attorney for appellants in the above-entitled cause, and moves this Court for the entry of the judgment herein *nunc pro tunc;* and states the facts in this behalf to be as follows:

This cause was argued and submitted to this Court on or about December 12, 1898, briefs of counsel for both parties having been theretofore filed in due course. This Court thereupon considered the case on its merits, and after deliberation this Court, on or about January 3, 1899, rendered its decision reversing the judgment of the Supreme Court of the Territory of Arizona, which was in favor of the defendants below, stating, directing and ordering in its opinion as follows:

"We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund

the bonds in question, and that the order of the Supreme Court of the Territory must be *reversed*, and the case remanded to that Court for further proceedings not inconsistent with the opinion of this Court."

Citation was served in this case March 16, 1897, and the record filed in this Court April 8, 1897 (Record, p. 14).

The attorney for the appellants further states that Elizabeth B. Voorhies, one of the appellants, has died pending the appeal to this Court, to wit, on November 18, 1897, in proof whereof he submits the affidavit of Francis W. Coler, a copy of which is annexed, and the original whereof is filed herewith.

Wherefore, the attorney for the appellants prays this Court to enter its judgment of reversal herein as of a date prior to the said 18th day of November, 1897, the date of the death of the said Elizabeth B. Voorhies, and that the said judgment of reversal and the mandate of the Court herein to the Court below shall authorize and direct the Supreme Court of the Territory of Arizona to enter its judgment granting the mandamus sought by the appellants as of the term at which the said action was tried in the Supreme Court of the Territory of Arizona, or of some suitable date prior to the said 18th day of November, 1897, to be determined and fixed upon by this court.

JOHN F. DILLON,
Attorney for Appellants.

ARGUMENT.

When a party dies after the appeal has been perfected, and while the cause is pending in the Court, it is the practice of this Court and other Courts, including the Court of Chancery in England, on motion or as a matter of course, to order the judgment

or decree to be entered *nunc pro tunc* as of a date prior to the death of the party.

Clay vs. Smith, 3 Pet., 411.
Bank of United States vs. Weisiger, 2 Pet., 331, note. The defendant having died during the term, the Court ordered the decree to be entered as of a day before his decease (p. 481).
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Clay vs. Smith, 3 Pet., 411.
Bank of United States vs. Weisiger, 2 Pet., 331, note.
Redfield vs. Parks, *supra*.

It makes no difference that in this case the said appellant Elizabeth B. Voorhies died prior to the commencement of the present term of the Court. Her death occurred long after the appeal was perfected to this Court, and long after the cause was fully before this Court, and the cause would have been reached for

hearing and argument before her death had it not been for the crowded condition of the calendar and the consequent delay of the Court in hearing the cause. This case, therefore, equally with the others above referred to, is within the maxim *actus curiæ neminem gravabit.*

The expiration of the 1896 term or of the 1897 term of this Court had no effect upon the standing of this case in this Court, for at the end of each of those terms this Court made an order continuing to the next succeeding term all the cases then in the Court and undecided. Such orders continued this case to the 1898 term of this Court, and the case was and is before the Court precisely as it would have been had the appeal been perfected during the 1898 term of the Court. This Court, therefore, has the power to enter its order *nunc pro tunc* as of *any date while the case has been in the Court for its consideration*, and may enter it as of some date prior to the 18th day of November, 1897, the date when Mrs. Voorhies died.

In other words, this Court, having continued the case from the 1896 term to the 1897 term, and again from the 1897 term to the 1898 term, and having now heard and decided this case, has as much power now to enter its decree *nunc pro tunc* as of some date prior to the 18th day of November, 1897, the date when Mrs. Voorhies died, as it would have had if the case had been reached for argument, and argued, and submitted for the Court's decision in the 1896 term or in the 1897 term. The power of the Court over the case is continuous and unbroken from the time the case enters the Court until it is finally decided and the mandate issued. There has been no hiatus, no interregnum, no break in the continuity of the jurisdiction.

Mr. FREEMAN states the principle and rule with regard to the entry of judgments *nunc pro tunc* as follows (*Freeman on Judgments*, 2d ed., sec. 56):

"Sec. 56. The policy of entering judgments and decrees, *nunc pro tunc*, is agreeable to the maxim '*actus curiæ neminem gravabit*'—'An act of the Court shall prejudice no one.' This maxim, says Mr. BROOM, 'is founded in justice and good sense, and affords a safe and certain guide to the administration of the law.' As an expression of the principle upon which judgments are given effect, as of some time prior to their actual entry, the maxim, in the interest of accuracy, requires to be changed to 'A delay of the Court shall prejudice no one,' and to be limited in its application so as to effect none but the parties litigant. The power of making an entry, *nunc pro tunc*, seems to have been possessed and exercised by courts of law and of equity from the earliest times. The period in which this power could be successfully invoked was never limited; a decree in one instance being entered after the lapse of twenty-three years. The practice was confined to those cases in which some hardship would be visited upon one of the parties without any fault of his, unless he was relieved from it by allowing his judgment to be entered at some period when he was legally entitled thereto, and of such a date as was necessary to avoid the embarrassment in which he would otherwise be involved" *(citing numerous cases)*.

Copy of Affidavit Referred to in the Foregoing Motion.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898, No. 94.

JAMES L. UTTER and ELIZABETH B. VOORHIES,
Appellants,

AGAINST

B. J. FRANKLIN, Governor; C. P. LEITCH, Auditor, and C. M. BRUCE, Secretary, Loan Commissioners of the Territory of Arizona.

Affidavit.

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I, FRANCIS W. COLER, being duly sworn, do state that I knew Elizabeth B. Voorhies, one of the appellants in the above-entitled case, in her lifetime; that the said Elizabeth B. Voorhies died on November 18, 1897; that she left a last will and testament, and that the executors of her will are George Albright, Wesley Albright and W. H. Maginnis. Further deponent saith not.

FRANCIS W. COLER.

Subscribed and sworn to before me this 19th day of January, 1899.

E. P. BICKNELL,
Notary Public,
N. Y. County.

[NOTARIAL SEAL.]

No. 94.

Brf. of Wright for Appellees

Office Supreme Court U. S.
FILED
DEC 12 1898
JAMES H. MCKENNEY
Clerk.

Filed Dec. 12, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 94

JAMES L. UTTER AND ELIZABETH B. VOORHIES,
APPELLANTS,

vs.

B. J. FRANKLIN, GOVERNOR; C. P. LEITCH, AUDITOR, AND C. M. BRUCE, SECRETARY, LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

(16,556.)

BRIEF OF APPELLEES.

(16,556.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 777.

JAMES L. UTTER AND ELIZABETH B. VOORHIES, APPELLANTS,

vs.

B. J. FRANKLIN, GOVERNOR; C. P. LEITCH, AUDITOR, AND C. M. BRUCE, SECRETARY, LOAN COMMISSIONERS OF THE TERRITORY OF ARIZONA.

I.

STATEMENT OF CASE BY APPELLEES.

This is a petition for a mandate to the Loan Commissioners of the Territory of Arizona, compelling them to fund certain alleged bonds of Pima County into the bonds of the Territory.

Appellants claim, that by virtue of the Act of Congress, approved June 6, 1896, it is made the duty of appellee to fund said alleged bonds simply on the request of the owners thereof.

It will be noted that they do not allege that the authorities of Pima County have ever demanded the funding of these bonds; and it will further be noted that the allegations of appellants' petition proceeds on the simply theory that, on demand made on appellee to fund these bonds by the owners thereof, it then

becomes the duty of appellee to fund them, their act not being one of discretion, but simply to obey the demand to fund when made by the owner.

To this petition a demurrer was filed, and by the Supreme Court of the Territory sustained and the petition dismissed.

This ruling was placed, in the oral opinion of the court, on the ground that appellees were instructed by said Act of Congress to fund the "outstanding obligations" of the county "upon the official demand of said authorities" of the county; and that, as these alleged bonds are not an "outstanding obligation" of the county; and that, as the authorities of the county have not demanded that they be funded, therefore, no duty existed in appellee to fund them.

II.

THE FUNDING LAW AND ITS AMENDMENTS:

Sec. 10 of the Act referred to contains the only authority for funding county indebtedness by the Loan Commission, and is in these words:

> The Boards of Supervisors of the Counties, the municipal and school authorities, are hereby authorized and directed to report to the Loan Commission of the Territory their bonded and outstanding indebtedness, and said Loan Commission may, on written demand, require an official report from the Board of Supervisors, the municipal or school authorities, of the bonded and outstanding indebtedness, and said Loan Commission shall provide for the redeeming or refunding of the county, municipal and school district indebtedness UPON THE OFFICIAL DEMAND OF SAID AUTHORITIES in the same manner, etc.

It will thus be seen that, as a condition precedent to the funding of county indebtedness into Territorial bonds, the Board of Supervisors must first make an "official demand" on the Loan Commission so to do. Until this official demand is made, they not only do not have the power so to do, but this power is very clearly reserved from them; and this for the very simple reason that the counties have the right to fund their indebtedness or not as they see fit,—a right I submit, that cannot be taken from them by any legislative body.

On August 3, 1894, this funding Act was amended; but the amendment only goes to the extent of permitting the expense indebtedness of the Territory incurred between Dec. 31, 1894, and Dec. 31, 1895, to be funded. It does not therefore in any way touch upon any of the questions involved herein.

The second amendment is the Act of June 6, 1896, and is the Act on which petitioners rely, and contains these words (after referring to the foregoing Act and amendment)

*** are hereby amended and extended SO AS TO AUTHORIZE the funding of all OUTSTANDING OBLIGATIONS of said Territory and the counties, municipalities, and school districts thereof, AS PROVIDED IN THE ACT OF CONGRESS APPROVED JUNE 25, 1890, until January 1, 1897.

I submit that it follows from this that this Act is simply an authority to fund the indebtedness of the county, provided it be done "as provided in the Act of Congress approved June 25, 1890." As we have seen that Act provided that it might be done on the "official demand" of the county first being made so to do.

III.

IF THE ACT IS MANDATORY THEN IT IS VOID:

But, if it be said, that the Act relied upon is mandatory, that it commands the funding of this alleged indebtedness, whether the County wishes it or not, then, I insist, that the Act is wholly void, for in such case it is not an act to cure irregularities whereby an existing contract may be enforced, but is an act creating a contract.

It cannot be successfully contended that the bonds petitioners seek to have funded is the same contract that the funding bond would evidence, for in the latter contract the principal sum agreed to be paid, are each different, and, therefore, while the consideration may be the same, the old debt is paid, and a new one is created. It follows, therefore, that if Congress has the power to compel the making of this new contract, whether the County wishes it or not, then Congress has the power to make a contract which the principals did not make for themselves.

Cooley Const. Lt., p. 368.
Hasbrouck v. Larned, 13 Wis., 37.
Milford v. Larned, 16 Mass., 216.
Shonk v. Brown, 35 Mo. 174.

IV.

BUT THESE BONDS ARE NOT INCLUDED IN THIS ACT.

I CONTEND THAT THE ACT IN QUESTION MAKES NO ATTEMPT TO MAKE A CONTRACT AND THAT IT DOES NOT INCLUDE THE BONDS IN

QUESTION AT ALL; FOR IT EXPRESSLY CENFINES THE AUTHORITY IT GRANTS TO THE FUNDING OF ALL "outstanding obligations" of said Territory, and the Counties, etc.

Are these bonds "outstanding obligations" of Pima county?

In the case of Lewis v. Pima County, (155 U. S. 54) speaking of these bonds, the court says:

Now, unless a debt thus incurred in aid of the construction of a railroad can be said to be an obligation "necessary to the administration of the internal affairs" of Pima county, IT MUST NECESSARILY FOLLOW, irrespective of every other consideration, that the legislature exceeded its powers in authorizing and requiring the County to issue its bonds in exchange for those of the railroad company in question, AND THAT THE BONDS ARE VOID.

The Court then held that the legislature had no authority to authorize and require the County to issue these bonds.

Can it be said that a void bond is an outstanding obligation?

In construing this statute one must not overlook the fact that, if it is to be applied to the case at bar, that it is retroactive, and as such it must "be subjected to the most circumscribing construction *that can possibly be made consistent with the intention of the legislature.*"

3 Enc. of L., p. 758.

Can it be said that Congress intended the Loan Commission to fund bonds that have been declared void by the highest court in our land? bonds too that have not an atom of equity in them? bonds that were not in the minds of Congress when the act was passed?

How can this court so conclude?

Petitioner points out to us the Memorial of our legislature asking Congress to validate these bonds. It is to be presumed that the Act in question was passed by Congress in answer to this solemn and dignified request. Therefore, to examine this memorial will show what was before Congress when it acted, and what it thought it was doing in acting. This Memorial does not include these—bonds,—it does not specifically refer to them, nor does it by implication refer to them, but by implication excludes them.

See Memorial, Sess. Laws, 1895, p. 148.

If, therefore, a retroactive law is to be construed as I have said, if the Act under consideration provides for only funding the "outstanding obligations" of the County, and if these bonds had, at the time of the passage of the Act, been declared void by the highest court in the land, then by virtue of what can this court say that it was intended to include these bonds in the Act? I submit that it cannot be done and was never intended to be done, and if it was done, it was not done by Pima county.

V.

THESE BONDS, BEING WITHOUT EQUITABLE CONSIDERATION, AND THEIR INVALIDITY NOT BEING CAUSED BY ANY IRREGULARITY, CANNOT BE VALIDATED BY CONGRESS.

These bonds, as already shown, have been declared void. There being no irregularity in their issue, but, instead, they were issued in obedience to the command of the legislature, it follows, therefore, that they are not, and never were, an existing contract, and no benefit whatsoever has ever been received by the County from them.

In the cases where courts have had retroactive and curative statutes under consideration that have been sustained the dominating and potential reasons therefor as emphasized by the courts are:

1. That thay are simply acts to cure irregularities, so that an existing contract may be enforced; and

2. That in all such cases it would be obnoxious to conscience if the contract was not enforced.

Thompson v. Perrins, 103 U. S., 617,
Randall v. Kruger. 23 Wall. 149,
Reed v. Plattsmouth, 107 U. S. 575,
New Orleans v. Clark, 95 U. S. 652,
Granada County v. Horgdan, 112 U. S. 272,
Dentzel v. Woldie, 30 Cala. 145,
Otos County v. Baldwin, 111 U. S. 15.

VI.

HAS NOT OUR DEFENSE RIPENED INTO A VESTED RIGHT?

If the statute of limitations bars a claim, all courts hold that this is a defense that is a vested right, and cannot, therefore,

be taken away by legislation
new contract.

"So, he who was never
cannot have a demand creat
enactment." (Ibid.)

Why, then, does it not f
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in the land has solemnly de
which means that they are
which means that they do n
tract, can Congress legislate
contract where none existed
ane give it to these petition

To hold that such is th
be given the effect and force
claim less is to defeat their
holding that the demurrer i

ion; for to do so would be to create a

Cooley Const. Lt. 369.

er bound, either LEGALLY OR EQUITABLY, eated against him by mere legislative

t follow, that in the case of these bonds, isted from the date of their date, where paid on them, where the highest court declared that they were and are void, e not the bonds of the county, and o not stand for or evidence any con- ate into these void bonds life, make a ted, and take the money of the County oners?

the result of this Act of Congress, if it rce that petitioners claim for it, and to ir action, is the necessary result of r in this case shall be overruled.

Respectfully submitted,

C. W. WRIGHT,
For Appellees.

UTTER *v.* FRANKLIN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 94. Argued and submitted December 12, 1898. — Decided January 3, 1899.

It was within the power of Congress to validate the bonds in question in this proceeding, issued by the authorities of the Territory of Arizona, to promote the construction of a railroad.

THIS was a petition for a writ of mandamus to compel the defendants, who were respectively governor, auditor and secretary of the Territory, acting as loan commissioners, to issue certain bonds in exchange for bonds issued by the county of Pima in aid of the Arizona Narrow Gauge Railroad Company.

The petition set forth that plaintiffs were the *bona fide* holders for value of certain seven per cent bonds and coupons issued in July, 1883, in compliance with an act of the Territory "to promote the construction of a certain railroad," approved February 21, 1883, aggregating, including principal and interest thereon, the sum of $289,964.50. There was a further allegation in the petition that it was the duty of the defendants to provide for the redeeming of such indebtedness and to issue refunding bonds therefor; that plaintiffs had made demands for the same, which defendants had refused.

Defendants demurred to the petition, and for answer thereto averred that the bonds now held by the plaintiffs

had been declared, both by the Supreme Court of the Territory and by this court, to be void, and therefore the petition of the relators should be dismissed.

The petition being denied by the Supreme Court of Arizona, the relators appealed to this court. No opinion was filed in the Supreme Court of the Territory.

Mr. John F. Dillon for appellants. *Mr. Harry Hubbard*, *Mr. John M. Dillon* and *Mr. William H. Barnes* were on his brief.

Mr. C. W. Wright for appellees.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

The bonds now held by the relators were declared to be invalid by this court in *Lewis* v. *Pima County*, 155 U. S. 54, upon the ground that bonds issued in aid of railways could not be considered debts or obligations "necessary to the administration of the internal affairs" of the county, within the meaning of the act of June 8, 1878, c. 168, 20 Stat. 101.

Whether the loan commissioners of the Territory can be required to refund these obligations, and issue new bonds to the holders thereof, depends upon the effect given to certain legislation upon this subject, both by Congressional and territorial statutes. These statutes were enacted both before and after the decision in *Lewis* v. *Pima County*, *supra*.

It seems that doubts were entertained as to the validity of bonds issued in aid of railroads, in view of the fact above stated, that, under the Congressional act of 1878, the power of municipalities to incur debts or obligations was limited to such as were necessary to the administration of their internal affairs. To put this question at rest, Congress on July 30, 1886, passed an act, c. 818, to limit territorial indebtedness, 24 Stat. 170, in the second section of which it was declared "that no Territory of the United States now or hereafter to be organized, or any political or municipal corporation, or subdivision of any such Territory, shall hereafter make any sub-

scription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association." This section was undoubtedly designed to put a stop to the practice, which had grown quite common in the Territories, of incurring debts in aid of railway and other corporations.

The fourth section provided for a limit of municipal indebtedness, and then declared "that nothing in this act contained shall be so construed as to affect the validity of any act of any territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law, nor to prevent any territorial legislature from legalizing the acts of any county, municipal corporation or subdivision of any Territory as to any bonds heretofore issued or contracted to be issued." This section evidently left the law where it stood before. It did not assume to pass upon the validity of any territorial act previously enacted, or of any obligations thereunder incurred; nor preclude the issue of bonds already contracted for under express provisions of law, leaving the courts to determine the validity of such acts and obligations, and the further question whether such bonds had been contracted for *in pursuance of express provisions of law*. It simply withheld its assent to, as well as its negative upon, such transactions, and declined to commit itself one way or the other. Nor did it assume to prevent the territorial legislature from legalizing the acts of any subordinate municipality as to bonds theretofore issued or contracted to be issued, leaving it to the territorial legislature to determine whether they should attempt to legalize such issues, and to the courts to pass upon the question whether this could be lawfully done. The bonds theretofore issued were left precisely where they stood before, and no attempt was made either to legalize or avoid them. Congress merely stayed its hand, and left the matter open for future consideration.

In this state of affairs the legislature of Arizona, on March

10, 1887, passed an act (Rev. Stat. Arizona, p. 361) constituting the governor, auditor and secretary of the Territory loan commissioners of the Territory, with the duty of providing "for the payment of the existing territorial indebtedness, due and to become due, and for the purpose of paying, redeeming and refunding all or any part of the principal and interest, or either, of the existing or subsisting territorial legal indebtedness," with power to issue negotiable bonds therefor. This power, however, was limited to the *legal* indebtedness of the *Territory*, and apparently had no bearing upon the indebtedness of its municipalities, certainly not upon indebtedness which had been illegally contracted. Indeed, the act is only pertinent as showing the authority under which the loan commissioners were appointed.

On June 25, 1890, c. 614, Congress passed an act, (26 Stat. 175,) approving with amendments this funding act of Arizona, "subject to future territorial legislation," the second section of which declared it to be the duty of the loan commissioners "to provide for the payment of the existing territorial indebtedness due, and to become due, or that is or may be hereafter authorized by law, and for the purpose of paying, redeeming and refunding . . . the existing and subsisting territorial indebtedness, etc." The tenth section of this act provided that the boards of supervisors of the counties, and the municipal and school authorities, should report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and that said loan commissioners should "provide for the redeeming or refunding of the county, municipal and school district indebtedness, *upon the official demand of said authorities*, in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may hereafter be allowed by law to said county, municipality or school-district, upon official demand by said authorities."

In compliance with the permit thus given by Congress for future territorial legislation, the legislature of Arizona on March 19, 1891, (Laws of 1891, p. 120,) enacted a new funding act, only the following sections of which are material:

"SECTION 1. That the act of Congress entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, be, and the same is hereby, now reënacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States."

"SEC. 7. Any person holding bonds, warrants or other evidence of indebtedness of the Territory or any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at no less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon."

It seems, however, that the existing legislation upon the subject was not deemed adequate by the territorial legislature, since in 1895 it adopted a memorial, (Laws of 1895, p. 148,) to the effect that, under various acts of the assembly, the counties were authorized to and did issue railroad aid bonds, which were sold in the open market at their face value, and were then held at home and abroad by *bona fide* purchasers; that the validity of these bonds, though questioned, was acknowledged by the payment of interest thereon; that a repudiation of the same would work a great hardship to the holders and affect the credit of the Territory, and therefore the general assembly urged upon Congress the propriety of passing such curative legislation as would protect the holders of all bonds issued under authority of its acts, the validity of which had been acknowledged, and relieve the people from

the disastrous effects of repudiation. The memorial is printed in full in the margin,[1] and in construing the act of Congress passed in response thereto it may probably be considered as

---

[1] MEMORIAL.

To the Senate and House of Representatives of the United States of America in Congress assembled:

Your memorialists, the legislative assembly of the Territory of Arizona, beg leave to submit to your honorable bodies; that —

Whereas, under various acts of the legislative assembly of the Territory of Arizona, certain of the counties of the Territory were authorized to issue in aid of railroads and other *quasi* public improvements and did under such acts issue bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons who, in good faith, invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are holders of the same; and

Whereas the validity of these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and

Whereas there has recently been raised a question as to whether these acts of the legislative assembly were valid under the organic law of the Territory, which had led to movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and

Whereas we believe that such repudiation would, under the circumstances, work great wrong and hardship to the holders of such bonds, and at the same time seriously affect the credit and standing of our people for honesty and fair dealing and bring us into disrepute:

Therefore we most strongly urge upon your most honorable bodies the propriety and justice of passing such curative and remedial legislation as will protect the holders of all bonds issued under the authority of acts of the legislative assembly, the validity of which has heretofore been acknowledged, and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and relieve the people of the Territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the Territory, and that you may so further legislate as to validate all acts of the legislative assembly of the Territory which have held out inducements for the investment of capital within the Territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the Territory, and thus relieve the honest people of the Territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people.

Resolved, That our delegate to Congress be, and he is hereby, instructed

bearing upon the intention of Congress and the exigencies the act was designed to meet.

In compliance with this memorial Congress on June 6, 1896, 29 Stat. 262, c. 339, passed an act extending the provisions of the act of June 25, 1890, and the amendatory act of 1892, (not here in question,) the first section of which provided that the above acts "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June 25, 1890, until January 1, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June 25, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June 25, 1890, and the act amendatory thereof and supplemental thereto approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided until January 1, 1897: *Provided*, That nothing in this act shall be so construed as to

to use all honorable means to bring this subject to the earnest consideration of Congress; that the secretary of the Territory be, and he is hereby, requested to transmit a copy of the foregoing to each house of Congress and to our delegate in Congress.

make the government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

This is the act upon which the relators place their chief reliance. Its evident purpose was to authorize the funding of *all outstanding bonds* of the Territory, and its municipalities, which had been *authorized by legislative enactments*, whether lawful or not, provided such bonds had been "sold or exchanged in good faith and in compliance with the terms of the act of the legislature by which they were authorized." The second section deals with the original bonds which had not been theretofore funded, and provides that all such as had been theretofore issued under the authority of the legislature, and which by the first section were authorized to be funded, should be confirmed, approved and validated, and might be funded until January 1, 1897.

We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a state legislature has over its municipal corporations. *American Ins. Co.* v. *Canter*, 1 Pet. 511; *National Bank* v. *Yankton County*, 101 U. S. 129.

Curative statutes of this kind are by no means unknown in Federal legislation. Thus, in *National Bank* v. *Yankton County*, *supra*, this court sustained an act of Congress nullifying a legislative act of the Territory of Dakota authorizing the issue of railway bonds, but validating action theretofore taken by the county voting subscription to a certain railroad company, holding it to be "equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute." In *Thompson* v. *Perrine*, 103 U. S. 806,

we also sustained a similar act of the State of New York ratifying and confirming the action of commissioners in issuing similar bonds. In *Read* v. *Plattsmouth*, 107 U. S. 568, a similar ruling was made with regard to an act of the legislature of Nebraska validating an issue of bonds by the city of Plattsmouth for the purpose of raising money to construct a high school building. See also *New Orleans* v. *Clark*, 95 U. S. 644; *Grenada County* v. *Brogden*, 112 U. S. 261; *Otoe County* v. *Baldwin*, 111 U. S. 1; 1 Dillon Municipal Corporations, § 544; Cooley's Const. Lim. 6th ed. 456; *Bolles* v. *Brimfield*, 120 U. S. 759; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Dentzel* v. *Woldie*, 30 California, 138, 145.

The fact that this court had held the original Pima County bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was *res adjudicata* only of the issues then presented, of the facts as they then appeared, and of the legislation then existing.

Nor was the act intended to be confined to the outstanding *legal* indebtedness of the county. The first section of the act *requires* the funding of all outstanding obligations of said Territory and its municipalities, and all outstanding bonds, etc., of the Territory and its municipalities, "heretofore authorized by legislative enactments of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 5, 1890," which said bonds, etc., "have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized;" and the second section confirms, approves and validates all bonds and other evidences of indebtedness theretofore issued under the authori of the legislature, and authorized to be funded by the first tion, and declares that they "may be funded, as in this ac rovided, until January 1, 1897." Construing this in the light of the surrounding circumstances, and, particularly, in view of the memorial, it

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is entirely clear that it was intended to apply to bonds issued under authority of the legislature, and purporting on their face to be legal obligations of the county, whether in fact legal or not; and to put the matter still further beyond question, they are expressly declared to be legal and valid. It is true that, by the tenth section of the act of Congress of June 25, 1890, the loan commissioners were authorized to refund municipal bonds "upon the official demand of said authorities" of the municipalities, but there is no limitation of that kind in section seven of the territorial funding act of March 19, 1891, which declares that "any person holding bonds, etc., . . . may exchange the same for the bonds issued under the provisions of this act at not less than their face or par value and the accrued interest at the time of the exchange."

In addition to this, however, the act of Congress of June 6, 1896, declared that all the outstanding bonds, warrants and other evidences of indebtedness of the Territory and its municipalities *shall* be funded with the interest thereon, etc.

We are, therefore, of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question, and that

The order of the Supreme Court of the Territory must be reversed, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court.